

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

From July 1, 1940

Through September 30, 1939

Volume XX

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from July 1, 1940 through September 30, 1940.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,
Attorney General.

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OPINIONS

July 1, 1940.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

State Prison Lands — Conveyance —

State lands theretofore devoted to the use of State penal institutions may be conveyed by instrument executed by the Director of the Department of Corrections and Institutions; and the Governor properly may join in said conveyance.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of July 1, 1940, requesting my opinion as follows:

"The State of Alabama owns, or claims to own the following described tract of land:

"That parcel of land lying in the $W\frac{1}{2}$ of Section 34, T. 17N., R. 18E, bounded on the East by the $\frac{1}{2}$ Section line, on the North by the South right-of-way line of the Montgomery-Wetumpka Highway, on the South by the North right-of-way line of the Seaboard Air Line Railway, and on the West by an established line. This area is more particularly described below:

"Commencing at the SE corner of Section 34, T. 17N., R. 18 E; thence 2640.6' W. along the South line of said Section to the SE corner of the $SW\frac{1}{4}$ of said Section; thence 406.5 ft. N., along the half section line to the intersection with the N. right-of-way line of the Seaboard Air Line Railroad (R. R. R. O. W. is 100' wide) which is the point of beginning.

"Thence 2507.2 ft. N. 3° -55' W. along the $\frac{1}{2}$ Section line, to the intersection with the South right-of-way line of the Montgomery-Wetumpka Highway (R. O. W. is 100' wide;—50' N. & 50' S. of centerline of road); thence 1597.2 ft. S. 83° -23' W. along the said South line of the highway right-of-way; thence 1593.8 ft. S. 9° -07' E. to the intersection with the North right-of-way line of the Seaboard Air Line Railroad; thence 1668.4 ft. more or less, S. 63° -38' E. along the said North right-of-way line of the Seaboard Air Line Railway, to the point of beginning.

"The area conveyed by this lease lies in the $SE\frac{1}{4}$ of $SW\frac{1}{4}$; the $NE\frac{1}{4}$ of the $SW\frac{1}{4}$; the $SE\frac{1}{4}$ of the $NW\frac{1}{4}$; the $SW\frac{1}{4}$ of the $NW\frac{1}{4}$; and the $SW\frac{1}{4}$ of the $SW\frac{1}{4}$ of Section 34, T. 17N., R. 18E., and contains 70.7 acres, more or less.'

"There is under consideration a proposition to lease the above described real estate to the United States of America, for the training of troops, for one year, giving to it the option of renewing such lease for an additional ninety-eight (98) years.

"Will you kindly advise whether such conveyance is proper under the provisions of Section 6851 of the Code of Alabama of 1923, as amended by Acts of 1931, page 674.

"Also kindly advise if Section 3663 of the Code of Alabama of 1923 is applicable, and, if so, whether such conveyance should be executed by the Director of the Department of Corrections and Institutions or by the Director of Finance."

In my opinion, your first inquiry should be answered in the affirmative, that is to say, that it is not improper for the conveyance to be signed by the Governor, as is provided for by Section 6851 of the Code of Alabama, 1923, as amended by Act No. 592, H. 374, approved August 4, 1931, General Acts, 1931, page 674.

Answering your second inquiry, it is my opinion that, under the authority of Section 3663 of the Code of Alabama, 1923, the conveyance should also be executed by the Director of the Department of Corrections and Institutions.

We understand from your inquiry that the lands described as a part of lands heretofore devoted to the use of the Department of Corrections and Institutions.

Section 3663 of the Code of Alabama, 1923, provides:

"Section 3663. Renting out state lands.—Such of the lands owned by the state as are not needed for the convict system may be rented out by the president of the board (of administration) with the approval of the board."

Act No. 91, H. 261, approved March 1, 1939, General Acts, 1939, page 118, which created the Department of Corrections and Institutions, in Section 4 thereof provides in part:

"All Departments, boards, bureaus, commissions, agencies and offices of the State exercising or authorized to exercise any of the functions or duties conferred upon the State Department by this Act are hereby abolished, and all of their functions and duties are hereby transferred to and conferred upon the State Department. Without limiting the generality of the foregoing, the State Board of Administration and all offices and officers thereof are hereby abolished and all of its powers, functions and duties relating to the administration, operation, supervision and control of the penal and correctional institutions of the State are hereby transferred to and conferred upon the State Department."

So that the authority to convey, provided for in Section 3663, *supra*, is now vested in the Director of the State Department of Corrections and Institutions.

The provisions of Act No. 112, H. 72, approved March 7, 1939, General Acts, 1939, page 144, by which the Department of Finance of the State of

Alabama was created, in my opinion, do not operate to divest the Director of the Department of Corrections and Institutions of the authority conferred by Section 3663, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 2, 1940.

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Licenses—Fees and penalties of license inspector—Citations served by agent of State Tax Commission.

Fees and penalties collected by judge of probate from delinquent tax payer upon citation of agent of the State Tax Commission should be paid into the State Treasury.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of June 3, 1940, in which you request my opinion as follows:

"During the late fall or early part of 1936 Mr. H. C. Holmes of Abbeville, Henry County, Alabama, resigned as County License Inspector. His successor was not named until after the 1st of April 1936. During this period, or during the month of March 1936, a Field Agent of the State Tax Commission was in Henry County working on privilege licenses; there accrued, due to his efforts and his alone, the sum of \$83.56 in fees and penalties and I am still holding this amount due to the fact that I do not know who to pay the same to. Would you please advise me the legal disbursement that should be made of such sum."

The penalties which the statute imposes accrue upon the taxpayer's failure to pay the license tax at the time that the statute makes the same due. **Henry, Commissioner, v. Drennen Motor Car Co.**, 235 Ala. 559, 180 So. 563. As to the license inspector's fees, in order for the same to accrue to anyone, there must be service of citation in the manner and mode provided by law by the license inspector, his duly authorized deputy, or by any lawful officer. Section 353 of Revenue Act of 1935.

Section 87 of said Revenue Act provides "that the State Tax Commission may employ such * * * persons as * * * assistants as may be necessary for the performance of the duties which may be required of said Commission.

and said Commission shall fix the compensation of such * * * persons with the approval of the Governor, such compensation to be paid out by the treasurer out of the appropriation made for the annual expenses of the State Tax Commission and out of the fund or funds out of which such expenses are properly payable, upon warrants drawn by the Comptroller upon said fund or funds." The essentials of the statute are now in force, notwithstanding the change of the name of the department from the State Tax Commission to the State Department of Revenue, and notwithstanding the provisions of the Merit System Law.

In my opinion, the agent of the State Tax Commission, referred to in your request, is such a "lawful officer" as is contemplated by Section 353, *supra*.

Subsection (e) of Section 353 provides:

"The Probate Judge in remitting such penalties shall file report with the Comptroller and with the State Tax Commission showing the amount of such penalties collected, from whom and for what, the amounts paid to the License Inspector and the amount remitted, provided that in counties where the License Inspector is payable on a salary basis all fees and penalties shall be paid into the State Treasury."

In the situation here considered, the office of the license inspector was vacant and the agent of the State Tax Commission, referred to in your request, was acting in the stead of the License Inspector of Henry County. At the time of the service for which the fees accrued, the agent was on a salary basis, as provided by Section 87, *supra*. The legislative intent appears, from subsection (e), *supra*, that under the circumstances here, the fees and penalties should be paid to the State Treasury. Cf. Opinion to Hon. Saxon P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of March 8, 1937, reported in Quarterly Report of Attorney General, Vol. VI, page 108.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 2, 1940.

Hon. R. H. Wharton, President,
Commission of Jefferson County,
Birmingham, Alabama.

Counties—Hospitals—Section 1200, Code of 1923—General Acts,
1935, p. 195.

County governing body has authority to appropriate money out of general fund to assist in operation of a county hospital erected under the provisions of General Acts, 1935, p. 195.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of May 20, 1940, in which you request my opinion as follows:

"I will greatly appreciate it if you will give me the law pertaining to Jefferson County's legal rights in paying the bills for the operation of the Jefferson Hospital. Possibly you are not acquainted with all of the facts concerning this Hospital, so I will give you a few of them for guidance.

"The Hospital is being built by the Federal Works Agency, they are giving us a grant of \$966,272.00, and a loan at 4% of \$1,203,000.00. This Hospital is being built on property of Jefferson County and no request nor promise has ever been made to deed this property to the Federal Works Agency.

"The Government has set up no funds for the operation of this Hospital when it is finished, therefore it is presumed that the County will supply the operating funds, which funds I am unable to see at this time that the County will be able to supply. These funds are the ones that I am wanting to know if we have a legal right to pay?

"The Hospital in question will be operated by a regular charge to the patients and it is not supposed to be in any wise a charity institution.

"The loan inconnection with this Hospital is being covered by bond issue—the interest and principal is to be retired directly from revenue obtained from the operation of the Hospital.

"If I have not supplied you with sufficient data please let me hear from you and I will furnish you with any other information you may wish."

I call your attention to Section 1200 of the Code of Alabama, 1923, which provides:

"Municipal and county authorities may establish hospitals.—The corporate authorities of any town or city, and the court of county commissioners, or board of revenue, of any county may each establish within the town or city, or within the county, hospitals, temporary or permanent, for the reception of the sick or infirm, or of persons suspected to have infectious or contagious diseases, and may make all needful rules and regulations for the control and management thereof, and may confer by contract upon any institution for the instruction of students of medicine located in the city, town, or county in which such hospital is situated, upon such terms and for such number of years as they may determine, the right to select the visiting staff of physicians to such hospital for the collegiate course of each year and to hold clinics on the patients therein and have its students attend such clinics. The corporate authorities and the court of county commissioners, or board of revenue, may unite in the establishment of such hospitals, if deemed

expedient making them common for the use of the town or city and of the county, and in the making of rules and regulations for the control and management thereof, and shall jointly have the same powers and authority above conferred upon each."

Act No. 154, H. 482, approved June 26, 1935 (General Acts, 1935, p. 195) authorizes a county under certain conditions and restrictions to build hospitals.

Section 3 of Act No. 154, supra, provides in pertinent part as follows:

"In addition to the powers which it may now have, any municipality shall have power under this act: * * * (b) to operate and maintain any undertaking for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the municipality, (c) to prescribe and collect, rates, fees, tolls, or charges for the services, facilities, and commodities furnished by such undertaking and in anticipation of the collection of such rates, fees, tolls or charges to issue revenue anticipation bonds to finance in whole or in part the cost of the acquisitions, construction, reconstruction, improvement, betterment or extension of any undertaking and * * *."

Subsection (b) of Section 2 of Act No. 154, supra, is as follows:

"The term 'municipality' shall include any county, incorporated city or town in the State."

In compliance with Act No. 154, supra, a petition was filed by the Commission of Jefferson County with the State Department of Finance requesting consent to the issuance or sale of \$1,300,000 of Jefferson County Hospital Revenue Anticipation Bonds. This petition points out that there is no suitable facility for the treatment of patients afflicted with contagious diseases. Upon hearing the testimony, the issuance and sale of these bonds was approved. Subsequently, the Supreme Court of Alabama upheld the validity of these particular bonds in the case of **Patterson v. Jefferson County**, 191 So. 681.

Section 9 of Act No. 198, H. B. 596, approved November 3, 1932 (Local Acts, 1932, p. 84), provides.

"That the property of said county of every nature, character and description whether real, personal or mixed, shall be under the supervision and control of the County Commission, who shall exercise the power to sell, regulate and define the use thereof, and may make such rules and regulations as they may deem prudent and expedient for the care, protection and use of such property." (Emphasis supplied)

In the case of **Corning v. Patton**, 236 Ala. 354, 182 So. 39, the Supreme Court held that the County Commission of Jefferson County under its general authority of control had implied authority to lease the site of the former courthouse and cities with approval the case of **Jackson v. Ball, et al.**, 211 Ala. 273, 100 So. 327, wherein the court held:

"It would be a narrow and unbusinesslike interpretation to hold that the lawmakers contemplated that county property should lie idle and unremunerative notwithstanding the commissioners' court deemed it advisable to sell the same."

It is generally recognized that commissioners have certain implied powers in addition to those given in expressed terms; but such implied powers exist only ex necessitate and to the extent that they are essential as an incident to the very existence of the board or to the complete discharge of all the powers, duties and obligations conferred upon it by law. **Blades v. Hawkins**, 240 Mo. 187, 112 S. W. 979, 14 Am. Jur. 200.

It has been repeatedly held by the Supreme Court that in the performance of their duties with reference to the location, erection, repair or removal, "or in the furnishing of the county's buildings, bridges and roads," the court of county commissioners exercises a function that is quasi legislative. **Ensley Motor Car Co. v. O'Rear, Treasurer**, 196 Ala. 481 71 So. 704; **Watkins v. Marengo County**, 137 Ala. 155, 34 So. 171; **Talley v. Jackson County Commissioners**, 175 Ala. 644, 39 So. 167; **Town of Eutaw v. Coleman**, 189 Ala. 164, 66 So. 464; **Commissioners Court v. Hearn**, 59 Ala. 371; **Askew v. Hale County**, 54 Ala. 639, 25 Am. Rep. 730; **Thompson v. Chilton County**, 236 Ala. 14, 21, 81 So. 701.

The title to the property on which the hospital has been erected vests in Jefferson County. The building itself is the property of Jefferson County subject to the right of the bondholders to have a receiver appointed, in case of default on the bonds, to operate the hospital. As pointed out by Justice Anderson in **Jackson v. Ball**, supra, it would be a narrow and unbusinesslike interpretation of the statutes to hold that the county may erect a large hospital on county property and then not have the power to appropriate funds to assist in the operation of the same. Act No. 154, supra, gives this additional power and authority to the county commissioners.

Section 1200 of the Code of Alabama, gives the authority to the county to establish hospitals for the reception of the sick or infirm or of persons suspected to have infectious or contagious diseases without distinction as to whether said hospitals are operated free or for pay. It has never been questioned that the county had authority to appropriate money for the erection and maintenance of a hospital for its indigent citizens.

Act No. 154, supra, authorizes the county to establish a hospital that will be self-sustaining and by implication it gives the county authority to appropriate money out of the general fund to begin the operations. This appropriation would revert back to the county out of the proceeds paid into the hospital by the patients admitted. To rule otherwise would deprive the county of the use of very valuable property for many years to come. It is the duty of the governing body to preserve and protect the property belonging to the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 3, 1940.

Hon. L. F. Horn,
Sheriff, Crenshaw County,
Luverne, Alabama.

Costs—Peace Proceedings—

1. Where a person is tried before a magistrate on peace hearing, the magistrate may enter judgment for costs against the defendant on which execution may issue.

2. The costs for feeding prisoner in jail on peace proceedings is paid by the state as it pays for feeding other prisoners.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 20, 1940, in which you request my opinion as follows:

"Your opinion at your earliest convenience as to the procedure to obtain my fees in the following case would be appreciated:

"B makes complaint before Justice of the Peace against A who has threatened B. Warrant is issued for Peace proceedings and the sheriff arrests A and places him in County Jail.

"Specifically, what is the procedure for collecting my fees for arrest, etc. and for the costs of the feed bill of the prisoner during the time he is in the County Jail, and by whom would said fees be paid?"

Where complaint against a person is made and warrant issued for his arrest under Article II of Chapter 204 (Sections 5138-5158) code of Alabama, 1928, Michie, to keep the peace, the costs of the proceedings or any part thereof, under Section 5149, Code of Alabama, 1928, Michie, if judgment requires such person to keep the peace, may be ordered paid by the person; and an execution may issue against such person for the collection of same. This section is as follows:

"Section 5149. Costs on defendant and execution.—In all cases where a person is required to keep the peace, the magistrate may order the costs of the prosecution or any part thereof, to be paid by such person; and an execution may issue for the collection of the same."

However, if no order as to costs is made, I know of no provision of law for the payment of same. Cf. Quarterly Report of the Attorney General, Vol. VII, p. 136.

As to feeding persons confined to jail who have been arrested in peace proceedings, I call your attention to Section 4802, Code of Alabama, 1928, Michie, which is as follows:

"Section 4802. Who may be confined in jail.—In addition to convicts sentenced to imprisonment in the county jail, the jail is used as prison for the safekeeping or confinement of the following persons: (1) Persons committed for trial for public offense; (2) convicts sentenced to imprisonment in the penitentiary, until their removal thereto; (3) persons committed for contempt, or on civil process; (4) persons committed on failure to give security for their appearance as witnesses in any criminal case; (5) persons charged with or convicted of a criminal offense against the United States; (6) insane persons, pending transfer to the insane hospital, or other disposition; and (7) all other persons committed thereto by authority of law."

I call your special attention to the last clause, sub-section 7 of the above quoted section, where it says, "all other persons committed thereto by authority of law." In this connection, I call your attention to Section 4827, Code of Alabama, 1928, Michie, which is as follows:

"Section 4827. Allowances for feeding prisoners.—Food for prisoners in the county jails, except as otherwise provided by existing laws, shall be paid for by the state as follows: there shall be allowed such amount as is actually necessary, for food for each prisoner daily, but the said amount so allowed cannot exceed forty-five cents per capita."

I am of the opinion that a person confined in jail on a peace proceeding is a prisoner within the meaning of the above quoted section. Biennial Report of Attorney General, 1932-34, page 438.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 3, 1940.

Hon. Wilbur L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Unpasteurized malt or brewed beverages labeled "draft" beer, in bottles or cans of the size prescribed in the Alabama Beverage Control Act and on which the excise tax prescribed by said act has been paid may be legally sold anywhere in Alabama that the sale and distribution of alcoholic beverages has been legalized.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of April 25, 1940, in which you request my opinion as follows:

"On May 3, 1939, the A. B. C. Board promulgated a Rule and Regulation relating to the sale and advertising of draught beer in bottles. This Regulation was amended on December 7, 1939, when evidence was presented that in 1938 the Attorney General's office unofficially ruled that beer sold in bottles would not be classified as draught beer. Copies of Regulations No. 39 and No. 48 are attached hereto.

"Article C of Section 23 of the Beverage Control Act reads in part as follows:

"'All malt or brewed beverages must be sold or dispensed from bottles, cans, etc. There shall be no draft or keg beer or malt beverages sold or dispensed within this State; provided, however, in rural communities with a predominant foreign population, after the payment of the tax imposed by this Act, draught or keg beer may be sold or dispensed by special permit from the Board. * * *"

"Section 28 of the Act provides that malt or brewed beverages must be sold in sealed containers such as bottles or cans, each bottle or can containing not to exceed one pint or sixteen ounces.

"We have had several communications from the members of the Alabama Wholesale Beer Distributors Association which charge that the A. B. C. Board is permitting the sale of draught beer in bottles which is contrary to the intent, purpose and letter of the Alabama Beverage Control Act.

"It will be appreciated very much if you will advise us as soon as possible whether or not beer sold in bottles or cans, sizes conforming to those specified in the Alabama Beverage Control Act but labeled 'draft beer' would be a violation of the Alabama Beverage Control Act, if sold in parts of the State other than a rural community where the predominant population is foreign.

"It will also be appreciated, in the event you hold that sales as outlined above would not be a violation of the law, if you will advise whether or not Regulation No. 39 amply covers the situation."

Your regulation No. 39, as amended on December 7, 1939, reads as follows:

"Permission is hereby granted wholesale distributors of malt or brewed beverages, properly licensed by this Board, to bring into the State of Alabama and offer for sale, to duly licensed dispensers of malt or brewed beverages, unpasteurized beer labeled as 'draft' beer, provided such draft beer is packed in sealed containers such as bottles, or cans, each bottle or can containing not to exceed one pint or 16 ounces and further provided that the excise tax of $\frac{1}{2}$ c on each 12 fluid ounces or

fractional part thereof has been paid to the Alabama Alcoholic Beverage Control Board; and further provided that such wholesale distributor has, in all further respects, complied with rules and regulations of the said Alabama Alcoholic Beverage Control Board and that such draft or unpasteurized beer strictly complies with the Alabama Beverage Control Act relating to the alcoholic content specified for such beverage.

"Permission is hereby granted manufacturers and/or wholesale distributors to advertise unpasteurized beer as indicated above as 'draft' beer, provided such advertisement is in compliance with Section 10 of the Alabama Beverage Control Act."

In my opinion, your inquiries should be answered in the affirmative.

If there is anything in the Alabama Beverage Control Act, which is Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 (General Acts, 1936-37, page 40) that prohibits the sale of unpasteurized malt or brewed beverages, labeled "draft" beer, in bottles or cans of the size prescribed in the Alabama Beverage Control Act and on which the excise tax prescribed by said act has been paid, in those parts of Alabama where the sale and distribution of alcoholic beverages has been legalized, other than in rural communities with a predominant foreign population, it is the following provisions from Subsection (c) of Section 23 of said act, and especially the emphasized portion thereof:

"All malt or brewed beverages must be sold or dispensed from bottles, cans, etc. **There shall be no draft or keg beer or malt beverages sold or dispensed within this State;** provided, however in rural communities with a predominant foreign population, after the payment of the tax imposed by this Act, draft or keg beer may be sold or dispensed by special permit from the Board, when in the judgment of the Board, the use and consumption of draft or keg beer is in accordance with the habit and customs of the people of any such rural community." (Emphasis supplied)

When the above quoted provisions of the act are considered in connection with the avowed purposes of the act, the definition of the word "draft", and the generally accepted meaning of the term "draft or keg beer," it is my opinion that these provisions of the act do not prevent the sale of unpasteurized malt or brewed beverages, labeled "draft" beer, in bottles or cans of the size prescribed in the Alabama Beverage Control Act and on which the excise tax prescribed by said act has been paid anywhere in Alabama that the sale and distribution of alcoholic beverages has been legalized.

The purposes of the act are stated in Subsection (a) of Section 3 thereof as follows:

"Section 3. Interpretation of Act. (a) This Act shall be deemed an exercise of the police power of the State of Alabama for the protection of the public welfare, health, peace and morals of the people of the State, and to prohibit forever the open saloon; and all of the provisions of this Act shall be liberally construed for the accomplishment of this purpose."

and Section 10 thereof reads as follows:

"Section 10. In order to protect the welfare, health, peace, temperance and safety of the people of the State, and to prevent the return of the saloon atmosphere, there shall be no alcoholic beverages as defined herein sold in less than sealed packages and/or consumed by purchasers, except as hereinafter provided. There shall be no open saloons operated within this State. There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines, and radio broadcasting stations, provided, however that malt or vinous beverages as herein defined may be advertised by means of billboards."

Webster's New International Dictionary (Unabridged), 2nd Edition, defines "draft" or "draught" as follows:

"Draft or draught. Act of drawing (liquid) from a cask, barrel, etc.: as beer and ale on draught."

The commonly accepted meaning of the term "draft or keg beer" is beer in a barrel or keg or similar container, which is drawn therefrom by the opening of a faucet or similar device, usually one glass or mug being drawn at a time.

When the above quoted provisions of Subsection (c) of Section 23 of the act are considered in the light of the purposes of the act, the definition of the word "draft", and the commonly accepted meaning of the term "draft or keg beer", it can be seen that the intention of said provisions was to prevent the sale of beer from barrels or kegs or other similar containers by means of drawing it therefrom through a faucet or other similar device, which the Legislature, no doubt, thought would tend to the creation of a saloon atmosphere, whereas, one of the purposes of the act is to prohibit forever the open saloon and to prevent the return of the saloon atmosphere.

In my judgment, neither the above quoted provisions from Subsection (c) of Section 23 of the act nor any other provisions thereof prohibit the sale of any kind of malt or brewed beverages, however labeled, in bottles, cans etc. of the size prescribed by the act and on which the excise tax prescribed by said act has been paid, anywhere in Alabama that the sale and distribution of alcoholic beverages has been legalized.

The premises considered, you are advised that, in my opinion, unpasteurized malt or brewed beverages, labeled "draft" beer, in bottles or cans of the size prescribed in the Alabama Beverage Control Act and on which the excise tax prescribed by said act has been paid, may be legally sold anywhere in Alabama that the sale and distribution of alcoholic beverages has been legalized.

The conclusion hereinabove reached is amply supported by the following well-known rules of statutory construction:

1. The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a

particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181(1).

2. Courts, in determining the Legislature's intention, in construing statutes, may look to other provisions of same act, consider its relation to other statutory and constitutional provisions, view its history and purposes sought to be accomplished, and critically examine the results that would flow from giving the statute meaning it might have if none of these things were considered. *Abramson v. Hard*, 229 Ala. 2, 155 So. 590.

3. A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a literal interpretation which would defeat the purposes of the Statute will not be adopted if any other reasonable construction can be given to it. See cases cited in 18 Alabama Digest 120, Statutes, Key No. 183.

It is further my opinion that your regulation No. 39, as amended on December 7, 1939, adequately covers this matter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 5, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Section 280 of the Constitution of Alabama, 1901, does not prevent a person who is a member of the county board of education from holding the position of collector of Tobacco Tax for the Department of Revenue.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 27, 1940, in which you request my opinion as follows:

"Mr. I. D. Tyson of Ohatchee, Alabama, is a member of the Calhoun county board of education and also holds an appointment with the State Tax Commission. His duties are confined primarily to the collection of tobacco taxes. Will you please advise me, at your earliest convenience, whether or not the holding of these two positions conflicts with the Section of the Constitution which provides that a person cannot simultaneously hold more than one office of profit in the State."

From your statement, it is my opinion that the fact that a person is a member of the Board of Education of Calhoun County and at the same time is employed by the State Department of Revenue, whose duties are confined to the collection of Tobacco Tax, does not in any way conflict with Section 280 of the Constitution of 1901 of the State of Alabama which prohibits the holding of two offices of profit at one and the same time. This office has repeatedly passed on similar questions, but in this connection I call your attention to an opinion of this office written on November 23, 1939, to Hon. P. B. Hamilton, Member Personnel Board, Mobile County, Quarterly Report of Attorney General, Vol. XVII, page 302. The question there inquired about is practically on all-fours with the question you present.

It has been held by this office on several occasions that one who is a member of a county board of education holds an "office of profit" within the meaning of Section 280 of the Constitution. The opinion above referred to, however, holds that one who is merely an employee of the Department of Revenue, and one who does not have a term of office does not hold such an "office of profit." It is therefore my opinion that Mr. Tyson is not prevented from holding his office as a member of the Calhoun County Board of Education merely because he is an employee of the Department of Revenue.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 5, 1940.

Hon. U. G. Watford,
Sheriff, Houston County,
Dothan, Alabama.

Sheriff—Report to Clerk.

Sheriff of various counties in Alabama are required to report to the clerk of the circuit court all persons committed to jail within ten days after such commitment, likewise he is required to report all persons released or discharged from jail within two days succeeding such discharge or release.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 26, 1940, in which you request my opinion as follows:

"Is it the duty of the sheriff to furnish to the Clerk of the Circuit Court a list of all prisoners committed for a period of every seven days, also a list of each prisoner released every two days?"

Section 4821, Code of Alabama, 1923, requires a sheriff to report in writing to the Clerk of the Circuit Court all commitments to jail within ten days next succeeding such commitment and when a prisoner is discharged from jail it is his duty to report to such clerk such discharge within two days next succeeding such discharge or release, and in making this report the sheriff should follow strictly the requirements of this section, which is as follows:

"Section 4821. Sheriff to report prisoners committed and discharged.—When a prisoner is committed to the county jail, it is the duty of the sheriff, of such county, in person or by deputy, to report in writing to the clerk of the circuit court of such county, within ten days next succeeding the commitment, the name of such prisoner, the day of his entering such jail, and by what authority, and upon what charge committed; and when a prisoner is discharged from, or otherwise leaves such jail, the sheriff shall report to such clerk, within two days next succeeding, the name of such prisoner and by what authority and when he so left or was discharged."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 5, 1940.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Building & Loan Association—Savings & Loan Association—

Building and Loan Association electing to proceed under alternative method provided in Section 46½ of Act No. 459, H. 770, approved September 21, 1939 (General Acts of Alabama, 1939, p. 616), subject to charter fee provided for in Section 6969 of the Code of Alabama, 1923, when it files its statement with the Probate Judge.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of June 15, 1940, follows:

"A building and loan association in this county desires to form a new corporation as provided by Act of the Legislature, 1939, page 616, Number 459, Section 46½. This new corporation is formed in the alternative method provided for under paragraph C of said Section instead of proceeding under the general laws of the State. Please advise whether or not the declaration filed under this provision of said Act is subject to a tax of \$1.00 per thousand on the capital stock as in the case of new corporations under the general laws of this State."

It is my opinion your inquiry should be answered in the affirmative.

In the case of **William L. Klein v. Jefferson County Building & Loan Ass'n**, 195 So. 593, the Supreme Court of Alabama held the Savings & Loan Act (Act No. 459, H. 770, approved September 21, 1939, General Acts of Alabama, 1939, p. 616) to be constitutional. In delivering the majority opinion of the Court, Mr. Justice Bouldin said in part as follows:

"The subject of legislation is the creation, operation, supervision, termination and regulation of all associations accepting monies from the public for the promotion of thrift and the financing of homes; the operation, supervision, termination and regulation of all corporations heretofore incorporated under the laws of this State for the conduct of the same business.

"It is designed to cover this field of legislation, repealing pre-existing statutes pertaining to Building & Loan Associations.

"The body of the Act looks to the future conduct of this business by 'Savings and Loan Association,' whose creation, management, supervision, final termination and liquidation are set forth in much detail, designed, among other things, to give holders of accounts the protection of insurance by the Federal Saving and Loan Insurance Corporation.

"The Act makes provision for building and loan associations incorporated and operating under former statutes to qualify and be converted into savings and loan associations.

"Article 9 (Section 46), requires steps taken to this end within a grace period of twelve months. All associations not qualifying under the new act within twelve months, or such extended time as the Commissioner may allow not exceeding six months (Section 48) are to be liquidated in the same manner savings and loan associations going out of business are to be liquidated. (Section 49).

"Section 46½, inserted by amendment, empowers such building and loan associations, with the consent of the holders of 2/3 of the book value of outstanding stock, to form a corporation under the general corporation laws of the State and merge the building and loan association into such new corporation on specified conditions.

"Said Section 46½ provides, in the alternative, that the building and loan association may become a new body corporate in a manner therein specified.

"Such new body corporate shall by operation of law be vested with title to all the assets, real and personal of the parent association.

"The new corporate entity to be set up under either alternative of Section 46½ is not to engage in a building and loan business. They are designed to be liquidating agencies set up by those interested in the assets to be liquidated, rather than under the conservator and receivership features of the Act."

It will be noted from the foregoing that when a building loan association elects to come under the provisions of Section 46½ of Act No. 459, supra, regardless of whether it proceeds under the general corporation laws of the State or in the alternative method therein specified, a new body corporate is created. It is a new, separate and distinct entity with new powers, privileges and duties (*North Birmingham Lumber Co. v. Sims & White*, 157 Ala. 595, 48 So. 84).

Therefore, it is my opinion that when the new body corporate files its statement of incorporation, it becomes subject to the charter fee required to be paid under the provisions of Section 6969 of the Code of Alabama of 1923.

Cf. Opinion to Hon. A. L. Hasty, Judge of Probate, Marengo County, Linden, Alabama, dated December 6, 1939, Quarterly Report of Attorney General, Vol. XVII, page 356, wherein it was held that when a National Bank is converted into a State Bank a charter fee as provided for in Section 6969, supra, must be paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 8, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Autauga County—Fines and Forfeitures—

1. The adoption of the 1923 Code does not repeal Local Act No. 594, H. 803, approved September 30, 1919 (Local Acts, 1919, p. 228).

2. Section 8 of the Local Act, approved September 30, 1919, applies to all claims registered before February 15, 1920, under Section 3, and to all claims registered after the passage of the act under Section 4 thereof.

3. The Local Act of 1919 regulating the registration of witnesses' and officers' fees against Fine and Forfeiture Fund of Autauga County applies to the Civil and Criminal Court of said county as to accepting fines and forfeiture claims in lieu of cash.

4. The Clerk of the Circuit Court as ex-officio clerk of the Civil and Criminal Court of Autauga County is not entitled to 5% commission on fines paid in registered witnesses' certificates and officers' certificates when turned in to the County Treasurer.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 4, 1940, in which you request my opinion as follows:

"Please refer to House Bill 803, Page 228, Local Acts of 1919, and House Bill 892, Page 244, Local Acts of 1923, and advise me in answer to the following:

"1. Do you construe Section 8 of the 1919 Act to mean those claims registered by or before the 15th day of February, 1920, as provided in Section 3 of this Act?

"2. If your answer to the above is in the negative, would you construe Section 4038 of the 1923 Code of Alabama as having repealed the 1919 Local Act in question?

"3. If the answers to both of the above questions are in the negative, and you hold that the 1919 Act applies to all fine and forfeiture claims that accrue or have accrued subsequent to February 15, 1920, and registered in recent years, would the 1919 Act apply in the Inferior Court of Autauga County as to accepting fine and forfeiture claims in lieu of cash, although the 1923 Act creating the Inferior Court does not have this provision in it?

"4. If you should construe the 1919 Local Act as still being in full force and effect, would the Circuit Clerk be entitled, as Circuit Clerk and as Ex-officio Clerk of the Inferior Court, to receive 5% commission in the form of fine and forfeiture claims in all instances where he had accepted fine and forfeiture claims in payment of fines in lieu of cash?"

It is my opinion that Section 8 of the Local Act, No. 594, H. 803, approved September 30, 1919, Local Acts, 1919, page 228, includes all claims registered before February 15, 1920, such claims registered as is provided by Section 3 of said act which is as follows:

"Section 3. Be it further enacted, That said Treasurer, or person acting in his stead, shall by publication once a week in some newspaper published in said County for four successive weeks, requiring all persons holding any such claims against said county to present the same for registration by or before the 15th day of February, 1920, or the same shall be forever barred. The expense of such publication shall be paid by the said county."

and also all claims registered after the passage of this act as provided by Section 4 of said act which is as follows:

"Section 4. Be it further enacted, that all claims accruing after the passage of this act shall be registered by such treasurer in the order in which they accrue, within six months after the same shall have accrued, and if not so registered within six months the same shall be forever barred."

In answer to your second inquiry, I wish to call your attention here to Section 4038, Code of Alabama, 1923, which is as follows:

"Section 4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

also to the same section in the 1907 Code which is Section 6888. This section is as follows:

"Section 6888. Fines to go to county, and judgment accordingly.—All fines go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

You will note that in the adoption of the Code of 1923, Section 688, supra, was amended by adding the following clause:

"Shall be paid in money."

It is my opinion that the adoption of the Code of 1923 of which Section 4038, supra, is a part, does not repeal Local Act No. 594, H. 803, approved September 30, 1919, supra, for reason the act adopting the Code of 1923, approved August 7, 1923, specifically provides in Section 3 as follows:

" * * * Section 3. No statute which applies or relates or which was intended to apply or relate to but one county, one municipality, or one other political subdivision of the State, though such statute might, strictly speaking, be classed as a general law, shall be repealed or affected in any manner by the adoption of this Code or the failure to incorporate it in the Code as a part thereof; but such statute shall remain unrepealed and be given the same force and effect as if it had been incorporated in the Code as a part thereof." Gen. Acts, 1923, p. 127.

So it appears that in adopting the Code of 1923, the Legislature safeguarded all statutes applying to local communities from repeal by implication. In this connection, I call your attention to an opinion by the Alabama Court of Appeals in the case of **Reid v. Wallace**, 27 Ala. App. 199, 168 So. 900.

In view of the fact that the above case is on all-fours with the question we have here, we see no need for further comment. I further refer you to the following opinions of this office:

Quarterly Report of Attorney General, Vol. V, page 45;

Quarterly Report of Attorney General, Vol. VII, pages 196 and 203.

The above opinions are in line with what we have held above.

My answer to your third request is in the affirmative as to the present Inferior Court as now constituted.

We find that the Local Act of 1923, *supra*, was amended by Act No. 158, H. 548, approved June 27, 1935 (Local Acts, 1935, page 82). This act purports to be an amendment to the 1923 Act, *supra*, yet we find that it is a complete reenactment of the whole law, changing the name of the court from the Inferior Court of Autauga County, Alabama, to the Civil and Criminal Court of Autauga County, Alabama. The Act of 1923, *supra*, was amended several times prior to the above named act, but we do not deem it necessary here to take into consideration these former amendments, as the amendment we are referring to now, as stated above, reenacts the whole law and repeals all laws in conflict with the same.

Section 2 of the amended act gives the Civil and Criminal Court of Autauga County concurrent jurisdiction with the several county courts of Alabama of all misdemeanors. This section is as follows:

"Section 2. That said Court and the Judge thereof shall have and exercise all the jurisdiction now conferred or which may be conferred by law on Justices of the Peace in criminal cases, and in addition thereto shall have concurrent jurisdiction of the several County Courts of the State of all misdemeanors."

While Section 2 above states the general jurisdiction of the Civil and Criminal Court of Autauga County, yet Section 3 of this act extends the jurisdiction of this court, but we do not deem that this makes any difference in considering the question we have here before us.

I also wish to call your attention to Section 8 of the Local Act of 1919, *supra*, which is as follows:

"Section 8. Be it further enacted, That all claims registered against the fine and forfeiture funds of Autauga County shall be accepted by the County Treasurer, or any official of said county, authorized by law to receive said fines and forfeitures, registered claims regardless of their kind or character in payment or liquidation of any fine imposed by any court of said County or for the payment or liquidation of any forfeiture or judgment entered up in the Courts of said county against sureties or parties against whom criminal charges are pending when said parties have failed to appear at the court on the day or at the time set for trial of any party or parties as required by the provisions of the bond under which they were released on bail."

You will note that this section says among other things:

" * * * That all claims registered against the fine and forfeiture funds of Autauga County shall be accepted by the County Treasurer, or any official of said county, authorized by law to receive said fine and forfeitures, registered claims regardless of their kind or character in payment or liquidation of any fine imposed by any court of said County * * * ."

I am of the opinion that when these two sections, i.e., Section 2 of the 1935 amendatory act, and Section 8 of the 1919 act, above quoted, are construed together, the answer to your third question, as stated above, is in the affirmative. The Court created under the 1935 act, supra, is a court of said county within the contemplation of Section 8 of the 1919 act, supra.

As to your fourth request, I call your attention to Subsection 16 of Section 6724, Code of Alabama, 1923, which is as follows:

"It is the duty of the Clerk of the Circuit Court: — * * * Sub-section 16. To render to the county treasurer, court of county commissioners, or board of revenue, within thirty days after each term of the court, a statement in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent balance to whomsoever is custodian of the county funds."

You can see from the above this 5% commission is paid on money only. Note the statute says, "and also what money they have received for the county, etc.". Therefore, you would not be entitled to this commission on witness and officer's claims which you have received in payment of fines.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 8, 1940.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Counties — County Commissioners — Bridges —

Court of county commissioners held authorized to compromise claim against the county for injuries sustained on bridge maintained and operated by the county when liability is shown, as provided for by Section 6457 of the Code of Alabama, 1923, subject to conclusive proof of negligence on the part of the county in proper maintenance of said bridge.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of June 29, 1940, in which you request my opinion as follows:

"I will thank you for an opinion on the following:

"Some weeks ago a citizen of this county had a fine mule to break its leg caused by stepping into a hole in a bridge on one of our county roads, thereby rendering the mule unfit for any further use. He filed a claim with Commissioners Court for \$250.00 which the Court disallowed. He then filed suit against the County for \$300.00 as damages alleging negligence on the part of the county in failing to keep the bridge in proper repair. Would the Commissioners Court be authorized to compromise this suit or claim? Would I be authorized to pay him a reasonable sum for his mule if allowed by the Court?

"I will appreciate a prompt reply to this inquiry as Court sits at Albertville in July and if we can legally compromise this claim would like to know it as soon as possible."

In reply, I wish to advise that your statement of facts does not disclose sufficient information for me to determine whether or not any liability rests upon the county. I must, therefore, answer your question conditionally.

A proposition of law, well settled by decisions of our Supreme Court, is that, if liability of a county for damages for injuries resulting to travelers on highways from defects in bridges and causeways is not fixed by statute, no such liability exists. **Lee County v. Yarbrough**, 88 Ala. 332, 6 So. 914; **Mobile County v. Maddox**, 195 Ala. 336, 70 So. 259, L. R. A. 1916D 511, 513; **Brown v. Shelby County**, 204 Ala. 252, 85 So. 416.

Section 6457 of the Code of Alabama, 1923, provides as follows:

"6457. Damages for injury by defect in bridge or causeway.—When a bridge or causeway has been erected by contract with the county commissioners, with a guaranty by bond or otherwise, that it shall continue safe for the passage of travelers and other persons for a stipulated time, any person injured, in person or property, before the expiration of such period, by a defect in such bridge or causeway, may sue in his own name on the bond or other guaranty, and recover damages for the injury, and if no guaranty has been taken, or the period has expired, may sue and recover damages of the county."

The footnote under the above quoted Code section in Michie's Code of Alabama gives the following analysis of Section 6457 of the Code of 1923:

"As respects the county's liability for injuries sustained to person or property on defective bridges or causeways as a part of highways within the county, rendered unsafe for the passage of travelers thereupon, there are four classes: (1) Those not erected or constructed by the county for which no liability is fixed by statute; (2) Those erected or constructed by the county without the intervention or agency of an independent contractor for which no liability is fixed by statute; (3) those erected or constructed by contract with the county commissioners 'with a guaranty, by bond or otherwise, that it shall continue safe for the passage of travelers and other persons for a stipulated time,' and such period has expired (without regard to the length of the period), in which event the statute declares that the party so injured may recover damages of the county; and

(4) when the bridge or causeway was erected or constructed 'by contract' and no guaranty has been taken by the county, in which case recovery of damages may be had of the county."

Your request does not disclose which, if any, of the above classifications would be applicable in your case. You state in your request that the claimant has filed suit against the county and has alleged negligence on the part of the county, in that the county failed to keep the said bridge in proper repair. It is my opinion that the alleged negligence on the part of the county and the county's liability, in any event, becomes a matter of parol proof. See **Brown v. Shelby County**, supra. Unless liability be shown upon a county, as set out above, and proof of negligence on the part of the county be shown conclusively, it is my opinion that no authority to pay any amount as a compromise of the above named claim is vested in the county governing body. See an opinion of the Attorney General to Hon. G. H. Howard, Judge of Probate, Elmore County, under date of July 1, 1936, reported in Biennial Report of Attorney General, 1934-36, page 716. See also **Hovater v. Franklin County**, 217 Ala. 439, 116 So. 526.

If the facts in your case should sufficiently disclose liability on the county for the reason that the bridge is one of those erected or constructed by contract with the county commissioners "with a guaranty, by bond or otherwise, that it shall continue safe for the passage of travelers and other persons for a stipulated time" and such period has expired (without regard to the length of the period), in which event the statute declares that the party so injured may recover damages of the county; or if the bridge in question is one of those erected or constructed "by contract" and no guaranty has been taken by the county, in which case recovery of damages may be had of the county, then, in my judgment, sufficient authority for the court of county commissioners to compromise the claim in question is found in Section 6755, Subsection 4, of the Code of 1923, as follows:

"6755. Authority of court.—The court has authority— *** (4) To examine, settle, and allow all accounts and claims chargeable against the county."

In my opinion, the word "settle", as used in the above quoted Subsection 4 of Section 6755, offers sufficient authority for the county governing body, if it be shown to be liable under the circumstances set out above, to compromise the claim against the county named by you. If such liability be not shown conclusively, however, it is my opinion that no authority to compromise or settle an invalid claim exists in the court of county commissioners.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1940.

Hon. E. S. Tunstall,
Tax Assessor,
Baldwin County,
Bay Minette, Alabama.

Taxation—Escape assessments—

The assessment of five years next preceding the current year required by Section 45 of the Revenue Laws of 1935 to be made of un-assessed property includes five years preceding the year in which the assessment for the five years is made.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 26, 1940, in which you request my opinion as follows:

"Please refer to Section 45, page 280, General Acts, Regular Session 1935. It reads in part as follows:

"Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten percent of the taxes assessed thereon for each year"

"Considerable discussion and difference of opinion exists down this way as to procedure under this section. My contention is that where property has escaped taxation for a period of, say over five years preceding the current year, that such 'back assessments' should cover a period of five full years prior to the current year, and that, if, in figuring the number of years, the current tax year is included the total would be six years. Several Attorneys and other interested parties have contended that the total, including the current year, should be five years, under the law. In other words, they figure that the current year, plus four back years, is what the law intends and speaks of.

"In view of the fact that this difference of a full year amounts to quite a considerable bit, I would appreciate your clarifying the matter for me. Does the five year period of possible assessment for back taxes include the current year in the five year period or does it exclude it. If it excludes it, it of course means five back years plus the current year."

In my opinion, the taxes of the current year are not to be considered in fixing the time referred to in Section 45 quoted in your letter of inquiry, i. e., the "five years next preceding the current year." You will note that the statute provides that whenever the tax assessor shall discover that any property has "escaped taxation" in any assessment "within five years next pre-

ceding the current year he shall list, return and value said property for assessment for the years during which the same as escaped taxation" etc. It is at once apparent that the taxes of the current year could not have "escaped taxation" for, although the assessment itself may have been closed, the taxes were not due until October, and, therefore, it could not be said that the property had escaped taxation. Cf. *State v. Doster-Northington Drug Co.*, 196 Ala. 447, 71 So. 427; *State v. City of New Orleans*, 30 So. 97, 99 (La.). It is interesting to note that in the *Doster-Northington Drug Co.* case the drug company, conducting its business in Jefferson County, Alabama, was assessed by the county tax commissioner of that county on its escaped insolvent credits and credits of value for the tax years running from October 1, 1908, to September 30, 1912, inclusive, and for the year beginning October 1, 1913, a total of six years. The Supreme Court, speaking through Mr. Justice Thomas, observed that:

"The authority to make the assessment for escaped taxation (for these years) was expressly conferred on the county tax commissioner by Section 2260 of the Code of 1907. *** "

As further indication of the fact that the current year's taxes are not to be included within the escape assessment, you are directed to Sections 37 and 47 of the Revenue Laws of 1935, *supra*, wherein the words "next preceding" are also used. In Section 37, it is provided that:

"It shall be the duty of the tax assessor to enter upon the tax return in the column provided **the next preceding year's** valuation for assessment of real estate and improvements and also to note on the tax return list whether there has been any physical change, such as improvements, etc. since the preceding year's assessment was made."

In Section 47 it is provided that:

"The assessed value of any real estate or improvements as fixed for taxation for **the year next preceding the then current tax year** shall be prima facie the basis of the value of such property for assessment for the current tax year. *** "

From the foregoing quotations it will be seen that the Legislature has used the words "next preceding" to mean the year or years prior to the current assessment year. There is no indication that a different intent existed in the enactment of Section 45, *supra*. As stated in *Smith v. Gibson*, 191 Ala. 305, 309, 68 So. 143:

"Although a different significance will be given as required by the context or the facts of the case, yet 'preceding' means generally next before, just as following means next after."

This office, while having never spoken directly to the question presented by your inquiry, has several times given approval to assessments upon property which has escaped taxation in each of the five years preceding the current assessment year. See *Biennial Report of Attorney General*, 1930-32, pp. 436, 355; *Quarterly Report of Attorney General*, Vol. XII, p. 117; and *Biennial Report of Attorney General*, 1936-38, p. 748.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1940.

Hon. Chris J. Sherlock,
Director, Highway Dept.,
Capitol.

Highways—State Highway Department—Rights of Way—

Highway Department may grant permission for the installation of a water main on the right of way of a public highway, but such permission would not divest the abutting land owners, who own the fee in the land, of any legal rights they may possess.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of June 18, 1940 follows:

"Re: Municipal Water Line on Right of Way of State Highway.

"This department has received a request from the town of Glencoe for permission to install a water main extending from Gadsden, Alabama to Glencoe, Alabama, on the right-of-way of a State highway. The distance this line will extend on the right-of-way of the State highway between the city limits of the above towns, is a distance of approximately three miles.

"Please advise this Department if it has the right to grant such permission. Reference is made to Section 1397(36) page 256, of Michie Annotated Code of Alabama, 1928. As you know, the rights-of-way were condemned or secured for the purpose of a public highway.

"An early response to this request will be appreciated, as the Town of Glencoe has asked that we answer this request as soon as possible."

It is my opinion that the Highway Department of the State of Alabama may grant its permission for the installation of a water line on the right of way of the public highway which extends between the cities of Gadsden and Glencoe, Alabama. See Section 1397(36) Michie's Code of 1928. Attention is called to the fact, however, that when the State procures a right of way for the purpose of a public highway, whether it be by dedication, purchase or condemnation, the fee in the land remains in the abutting owners. (**Western Railway of Alabama vs. Alabama Great Trunk Railway Co.**, 96 Ala. 272; **Hobbs vs. Long Distance Telephone & Telegraph Co.**, 147 Ala. 393, 41 So. 1003) and, therefore, permission by the Highway Department to install a water main upon a public highway right of way would not divest the abutting land owners of any legal rights which they may have against the water company. In other words, the Highway Department may grant permission for the water main to be laid along the right of way in question, but such permission carries no warranty and could not divest the abutting land owners, who own the fee in the land, of any rights they may possess.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1940.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Contraband beverages—

The Alabama Alcoholic Beverage Control Board has authority to destroy contraband alcoholic beverages seized by it, if, upon a chemical analysis of said beverages, it is found that the sale and subsequent consumption of the same, measured by applicable standards, would be detrimental to the health of the people of the State.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"Sections 33, 34 and 35 of the Alabama Beverage Control Act provide for the seizure of contraband goods that are confiscated for not having affixed thereto the Alabama stamp or marks of identification, which read in part as follows:

"Shall be delivered to the Board for sale at public auction to the highest bidder, after due advertising, etc."

"At the present time, we have on hand quite a supply of contraband whiskey and wine which we confiscated from bootleggers of the State. Due to the fact that this whiskey was seized from persons of questionable character and as we have no way to determine that the whiskey contained in these containers meets the specifications for the label that they have affixed thereto, the Board instructed that all such whiskey and wine be destroyed if it came within their power to order such destruction.

"It will be greatly appreciated if you will advise us as soon as possible whether or not the Board has the authority to destroy contraband whiskey seized from bootleggers and other persons of questionable character instead of selling same as provided for in Sections 33, 34 and 35 of the Alabama Beverage Control Act."

Sections 33, 34 and 35 of the Alabama Beverage Control Act set out the articles subject to confiscation under the provisions of said act and provide the procedure for the confiscation of the same. Among the articles subject to seizure are alcoholic beverages of all kinds manufactured, sold or distributed in violation of the provisions of said act. In Section 33 it is provided:

" *** and the said goods shall be delivered to the Board for sale at public auction to the highest bidder after due advertisement, but the Board before delivering any of said goods so seized shall require the

purchaser to affix the proper amount of stamps, crowns or lids to the individual package as above defined. The proceeds of sale for any goods sold hereunder shall be turned over to the State Treasurer by the Board as other funds collected by said Board. Provided, that the cost of confiscation and sale shall be paid out of the proceeds derived from such sales before making remittance to the State Treasurer."

Sections 34 and 35 contain analogous provisions that are referable to the above quoted provisions of Section 33, supra.

However, it is my opinion that the Alabama Alcoholic Beverage Control Board, notwithstanding these provisions of the Alabama Beverage Control Act, has the authority to destroy, rather than offer for sale, any contraband alcoholic beverages that it has seized, if, upon a chemical analysis of said beverages, it is found that the sale and subsequent consumption of the same, measured by applicable standards, would be detrimental to the health of the people of the State. Such, in my opinion, is in accordance with the legislative intent as gathered from the whole context of the Alabama Beverage Control Act. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159.

Subsection (a) of Section 3 of said act reads as follows:

"(a) This Act shall be deemed an exercise of the police power of the State of Alabama for the protection of the public welfare, **health**, peace and morals of the **people of the State**, and to prohibit forever the open saloon; and **all of the provisions of this act shall be liberally construed for the accomplishment of this purpose.**" (Emphasis supplied)

Section 10 of said act has other provisions designed "to protect the welfare, **health**, peace, temperance and safety of the people of the state ***."

In order to effectively accomplish this avowed general purpose of the Alabama Beverage Control Act, the Alabama Alcoholic Beverage Control Board is created by Section 4 thereof, and among the functions, duties and powers of the Board are the following as set out in Section 6 thereof:

"Section 6. The functions, duties and powers of the Board shall be as follows:

"(a) To buy, manufacture and sell alcoholic beverages and to have alcoholic beverages in its possession for sale, as defined and enumerated herein.

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein. ***

"(h) To appoint every officer, agent, and employee, in accordance with the qualifications specifically set out in this Act, required for the operation of the business of said Board, dismiss them, fix their salaries or remunerations, assign them their official positions and titles, define their respective duties and powers, require them or any of them to give bonds payable to the State in such penalty as shall be fixed by the Board, and engage the services of experts and of persons engaged in the practice of a profession.

"(i) To control the manufacture, possession, sale, consumption, importation, use and delivery of liquor, alcohol and malt and brewed beverages, in accordance with the provisions of this Act: ***."

Section 7(a) of said act provides as follows:

"Section 7. (a) The Board may from time to time make such regulations not inconsistent with this Act as it shall deem necessary for carrying out the provisions of this Act, and from time to time alter, repeal or amend such regulations, or any of them."

Section 53 thereof reads, in pertinent part, as follows:

"Section 53. The Board is hereby authorized to employ such clerical assistants, field agents, inspectors and chemists as may be necessary to carry out, enforce and administer the provisions of this Act: ***" (Emphasis supplied)

The above quoted provisions of Sections 6, 7 and 53 of said Act, in my opinion, invest the Alabama Alcoholic Beverage Control Board with authority to destroy, rather than sell, any contraband alcoholic beverages that it has seized if, upon a chemical analysis of said beverages, it is found that the sale and subsequent consumption of the same, measured by applicable standards, would be detrimental to the health of the people of the State. (It can be seen from the above quoted provisions of Section 53, supra, that you are in error in your statement to the effect that you have no way to determine the contents of the contraband alcoholic beverages seized by you, as said Section contains specific authority for the Board to employ such "chemists as may be necessary to carry out, enforce and administer the provisions" of the Alabama Beverage Control Act). I reach this conclusion notwithstanding the provisions of Sections 33, 34 and 35 of said Act referred to hereinabove. It would indeed be an anomalous situation if the provisions of Sections 33, 34 and 35, supra, required the Alabama Alcoholic Beverage Control Board to sell beverages, the consumption of which, measured by applicable standards, had been determined by chemical analysis to be detrimental to the health of the people of the State, when, as pointed out above, the Alabama Alcoholic Beverage Control Board was created to carry into effect the provisions of the Alabama Beverage Control Act, part of the general purpose of which, as hereinabove shown, is to protect the health of the people of the State. On the other hand, it is my opinion that the provisions of Sections 33, 34 and 35 of said Act referred to hereinabove would require the sale, in the manner provided in said sections, of all contraband alcoholic beverages seized by the Board, a chemical analysis of which had not proven that the sale and subsequent consumption of the same, measured by applicable standards, would be detrimental to the health of the people of the State.

The conclusion hereinabove reached is in accordance with the legislative direction contained in Subsection (a) of Section 3, supra, that "all of the provisions of this Act shall be liberally construed for the accomplishment of this purpose (the purpose of the act hereinabove set out)", and, in my opinion, is in conformity with the intention of the Legislature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 9, 1940.

Hon. John C. Martin,
Chairman, Board of Equalization,
Colbert County,
Tuscumbia, Alabama.

Board of Equalization—Review of Assessments—

Compliance with subdivision (f) of Section 13 of Act No. 143, S. 14, approved March 15, 1939 (General Acts of Alabama, 1939, page 178, not condition precedent to right to file protest requesting reduction in valuation placed upon property and having same considered by board of equalization.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of June 11, 1940, follows:

"The following statement of facts constitutes a question, the answer to which is needed for disposition of a protest filed before the Board of Equalization of Colbert County, Alabama:

"1. Assessment made by taxpayer December 2nd, 1939; regulation form for tax return and sworn to before the Tax Assessor.

"2. No reduction from previous year's assessment requested on assessment sheet return.

"3. The 1940 valuation subsequently voluntarily reduced by Board of Equalization.

"4. Protest filed by taxpayer at proper time requesting additional reduction.

"5. Section XIII (f) as to approval of taxpayer's and Tax Assessor's valuation by taxpayer and Board of Equalization not complied with by signature.

"Question: Can the Board of Equalization consider the protest in the regular session set aside for consideration of valid protests?"

From the facts set forth in your inquiry, it appears that a taxpayer filed a protest at the proper time requesting a reduction in the valuation of his property. You point out, however, that in his particular case, subdivision (f) of Section XIII of Act No. 143, S. 14, approved March 15, 1939 (General Acts of Alabama, 1939, page 178), was not properly complied with. Subdivision (f), *supra*, is as follows:

"(f) Immediately after January 1, of each year, the tax assessor shall deliver to the Board of Equalization all assessments as returned to him, and thereafter shall deliver all additional assessments returned to him. Such assessment sheet shall show the valuation fixed by the tax assessor and if such valuation be agreed to by the taxpayer, such taxpayer shall endorse on the assessment sheet valuation accepted.

..... Taxpayer, this day of
19..... If such valuation is satisfactory to the Board of Equalization and the date and signed by the Chairman such approved assessments shall be final and no appeal will lie therefrom."

Therefore, in view of the foregoing facts, you request my opinion as to whether or not this is a valid protest and can be considered along with other valid protests by the Board of Equalization when it sits in regular session for such purpose. It is my opinion that this inquiry should be answered in the affirmative. While it is true that a condition precedent to a statutory review by an officer or board must be complied with (**Daffin, Tax Assessor v. Scotch Lumber Co.**, 226 Ala. 33, 145 So. 452), yet, subdivision (f) of Section XIII, supra, is not a condition precedent to the right of review before a Board of Equalization. On the contrary, it will be noted that if the provisions of said subdivision are met, the effect is to make the assessment returned by the Board of Equalization final with no right of appeal therefrom.

It is therefore my judgment, based upon the facts presented for the purpose of this opinion, that the particular protest in question is valid and must be considered by the Board of Equalization when it sits in regular session for the consideration of other valid protests.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1940.

Hon. Geo. C. Kemp,
Fiscal Agent,
Alabama Boys Industrial School,
Birmingham, Alabama.

Records, Papers and Documents of the Alabama Boys Industrial School—

All documents pertaining to the affairs, business, or transactions of the Alabama Boys Industrial School which have ceased to be current should be deposited with the Director of the Alabama Department of Archives and History.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 15, 1940, in which you request my opinion as follows:

"Will you kindly advise us how long we are legally required to keep records, other than books, which have been audited and passed by the State Examining Department.

"We have a large accumulation of such records that we would like to dispose of."

Your request does not disclose the exact nature of the records. Therefore, I will have to deal with this request in a general way.

I know of no authority of law that would authorize you to destroy any record pertaining to the operation of your institution.

I call your attention to Sections 1406 and 2692, Code of Alabama, 1923, which are as follows:

"Section 1406. Authority of officials.—Any state, county, or other official may, in his discretion, turn over to the department for permanent preservation therein any official books, records, documents, original papers, newspaper files, and printed books not in current use in their offices."

The reference in this section to "department" is to the Department of Archives and History.

"Section 2692. Closed books of officers; to whom delivered.—All public officers and servants of the state whenever any book, paper or document pertaining to the affairs, business or transaction of their office, has ceased to be current, shall deliver the same together with a list of such books, papers and documents, to the director of the department of archives and history, receiving in return therefor a receipt from such director which shall also contain a list of such books, papers, and documents, and all such books, papers, and documents of officers and servants of counties and cities shall be, when they cease to be current, in like manner delivered to the probate judge of such county, and to the mayor, president of the city commission or other executive officer of the city, and in like manner, such officer to whom such books, papers and documents are delivered shall give his receipt therefor."

In my opinion, the above sections apply to the operation of the Alabama Boys Industrial School. See opinion to Hon. D. M. Weakley, Superintendent, Alabama Boys Industrial School, Birmingham, Alabama, Quarterly Report of Attorney General, Vol. XV, p. 266, wherein it was held that this institution is a public corporation and an agency of the State. Therefore, it is my opinion that all the books, papers or documents pertaining to the affairs, business or transactions of your institution which have ceased to be current may be delivered to the Director of the Department of Archives and History, as provided by the above quoted sections.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 9, 1940.

Hon. T. C. Garner, Treasurer,
Jefferson County,
Birmingham, Alabama.

County Governing Bodies—The Association of County Commissioners of Alabama—

Payment of dues in said association authorized upon adoption of appropriate resolution to that end by county governing body.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated June 17, 1940, is as follows:

"In my letter of December 22nd, 1939 to you, I asked for an opinion as to whether dues in a State-County Commission Organization was a legal expenditure so far as the Treasurer of Jefferson County is concerned.

"In reply to your letter of January 15, 1940, I again referred to the Dues of any County Official and your reply of February 20, 1940 stated that the expenditures referred to in my letters were unauthorized and should not be paid out of the County Treasury.

"For your information I am sending you a photostatic copy of the bill in question. This office has not questioned the right to pay the expenses of those attending the meetings, where proper resolutions have been passed by the County Commission, but I do question the legality of the dues.

"Your letter of February 20, 1940 to this office says it should not be paid and your letter to the Hon. J. W. Huestess of Montgomery, Alabama states in paragraph eight that the same principles no doubt applies to payment of reasonable dues for maintenance of such association."

"The conflict in the two opinions is not in any way chargeable to this office and inasmuch as they differ I would like for you to specifically pass on the reasonableness and the legality of the attached bill."

From documentary proof submitted by Hon. J. W. Heustess, Secretary of The Association of County Commissioners of Alabama, it appears that the Association was organized in 1929 and adopted by-laws, providing, among other things, that its membership shall consist of the county commissions or like governing bodies of the State.

It further appears from the by-laws that the purpose of the organization is to promote the construction and maintenance of good roads in the State and to promote a spirit of cooperation among the various counties on all questions relative to the welfare of the counties and State.

The secretary has submitted also the program for the 12th Annual Convention of the Association held in Birmingham beginning June 18, 1940, from which it appears that its program in large measure consisted in addresses and lectures in short form by various experts familiar with road and bridge work, and also exhibits relating to such work.

I am of the opinion, therefore, upon the reasoning shown in a former opinion of this office, hereinafter referred to, that a county governing body, upon adoption of an appropriate resolution, may legally authorize payment of dues for the maintenance of the association, inasmuch as its work and activities are primarily devoted to the promotion of better roads and bridges in the various counties of this State.

The principle is clearly stated in **Ensley Motor Car Co. v. O'Rear, Treasurer**, 196 Ala. 481, 71 So. 704, to the effect that county governing bodies, having original and plenary jurisdiction in the matter of public county roads and bridges, may in their discretion adopt such methods as are appropriate, for the better construction and maintenance of roads and bridges, and that their judgments may not be questioned or assailed, except for fraud or corruption in any court.

The opinion above referred to, which supports this conclusion, will be found in the Biennial Report of the Attorney General, 1934-1936, at page 160, being rendered to Hon. J. W. Heustess, Clerk, Board of Revenue, Montgomery County, Alabama, dated May 10, 1935. In that opinion the only question answered was as to payment of **expenses** of the members of the county governing body incurred in attending the meetings of the Association.

The resolution submitted as a basis of that opinion provided also for payment of dues to the amount of \$25.00 per year as the county's annual membership fee, but in some way the question as to dues was overlooked or not specifically answered. This instant opinion, therefore, is rendered as a supplement to the former opinion, and the effect is that payment of both dues and expenses may be authorized by an appropriate resolution of the governing body, for the reasons above stated.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 9, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Department of Revenue,
Capitol.

Income Tax—Government Reservations—Muscle Shoals.

Persons, not domiciled in Alabama, and residing on the government reservation known as Muscle Shoals, are not subject to the Alabama Income Tax Law as to income not earned, or received from sources in Alabama. Acts 1935, p. 397, Section 345.1.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of June 13, 1940, follows:

"The question of income tax liability now arises in the case of Charles B. and Beatrice D. Umland, House 19, Village 3, Wilson Dam, and others residing in the Muscle Shoals Reservation. In the instant case, Charles B. and Beatrice D. Umland filed an income tax return for the year 1939, under date of March 15, 1940, and made payment of income tax in amount of \$3.74. The payment was made under protest, which is quoted:

"'We live on a government reservation and understand we should be exempt from income tax but due to the fact no ruling has been made on this we are filing a return.'

"It developed from subsequent correspondence that Mr. Umland, whose original domicile was in the State of Montana, took up residence on the Government Reservation at Wilson Dam, May 6, 1935, and since that time has lived continuously on the Reservation where he earned his income from the Federal Government.

"Advice is requested as to whether or not Muscle Shoals Reservation has been ceded by the State to the Federal Government on the same basis as Maxwell Field Reservation, thereby exempting this individual from income tax, as set forth in your legal opinion dated February 29, 1940."

In **Webb v. J. G. White Corporation et al.**, 204 Ala. 429, 85 So. 729 (1920), involving the status of Muscle Shoals, it was observed:

"That Congress assumed jurisdiction over the reservation at Muscle Shoals, at Sheffield, where plaintiff's injuries occurred, and proceeded with the construction of the nitrate plant, is a matter of common knowledge."

Accordingly, it was held in that case that the Circuit Court of Colbert County was without jurisdiction of an action in tort for personal injuries sustained at Muscle Shoals.

As a basis for the decision, the Supreme Court referred to Sections 898 and 899 of the Code of Alabama of 1907, now appearing as Sections 1505 and 1506 of the Code of 1923, and numerous cases, both federal and state, to the effect that lands acquired by the United States, with the consent of a State, are no longer a part of the state, and that under Article 1, section 8, subsection 17 of the Federal Constitution, the United States has complete and exclusive jurisdiction over such lands except for the service of process.

From the Act of Congress cited as the "Tennessee Valley Authority Act of 1933," U. S. C. A. 16, Sections 831-831dd, pocket part, pages 273-299, it appears that the United States owns, maintains and operates properties "in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense ***," and to that end created "a body corporate by the name of the 'Tennessee Valley Authority.'" **Ashwander et al v. Tennessee Valley Authority et al.**, 297 U. S. 288, 372, 80 L. Ed. 688; **Posey v. Tennessee Valley Authority**, 93 F.(2d) 726 (C. C. A.)

I am of the opinion, therefore, that persons residing on the Muscle Shoals Reservation, and not domiciled in Alabama, are not subject to the Income Tax Laws of Alabama, in respect of income not earned, or received from sources, in Alabama.

See the opinion of this office dated February 29, 1940, to Hon. John C. Curry, Commissioner of Revenue, Quarterly Report of Attorney General, Vol. XVIII, page 292.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 10, 1940.

Hon. F. B. Pratt,
Superintendent of Education,
Bibb County,
Centreville, Alabama.

Schools—under General Law funds received by county boards of education as 10% commission for handling free textbooks cannot be used to purchase office equipment for said boards.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 27, 1940, in which you request my opinion as follows:

"In March of this year we received the sum of \$168.17 refund from E. E. Forbes. Do we have the same legal restrictions in spending this money as other school funds or could we use this money to purchase needed office equipment for the Bibb County Board of Education?"

By the refund from E. E. Forbes I assume you refer to the funds received through the State Textbook Purchasing Board as 10% commission for the handling of free textbooks in accordance with a contract entered into between said Board and E. E. Forbes and Sons Piano Company. In this

connection I wish to set out the resolution adopted by said Board on November 15, 1935, which resolution provides for the expenditure of said funds. Said resolution is as follows:

"WHEREAS, in the same contract the E. E. Forbes and Sons Piano Company, Incorporated, promised to pay the State Textbook Purchasing Board 15% on the retail purchase prices to the students on all books purchased directly by State agencies, and

"WHEREAS, under the Free Textbook Act passed by the Legislature and approved July 17, 1935, it now appears that the State Department of Education will purchase certain books directly, requiring a 15% refund on the prices of the books so purchased.

"NOW, THEREFORE, BE IT RESOLVED by the State Textbook Purchasing Board that

"(1) the State Superintendent of Education be and he is hereby authorized to accept 10% of the 15% refund accruing to the credit of the State Textbook Purchasing Board on account of its contract with E. E. Forbes and Sons Piano Company, Incorporated, as the Textbook Depository, in cash, same to be apportioned by the State Superintendent among the several boards of education and/or other school units receiving books under Act 201, approved July 17, 1935, according to their proportionate interests as determined by the State Superintendent and **used for proper storage, care, and distribution of State-owned textbooks in so far as the funds are needed for said purposes.** When the 10% cash fund is distributed, the State Superintendent is directed to inform the several local boards of education and/or other school units through their superintendents or principals that the money is to be **used for proper storage, care, and distribution of State-owned textbooks, and that any amounts remaining after these purposes have been satisfied may be used by the local boards of education and/or other school units for any legal school expenditures.**" (Emphasis supplied)

It will be noted that the use of the fund is limited to, first, the proper storage, care and distribution of State-owned textbooks in so far as the funds are needed for said purposes; and, second, any amounts remaining for any legal school expenditures.

The question then presents itself as to whether or not the purchasing of needed office equipment for the county board of education would be a **legal school expenditure** under the second category, as above set out. In my opinion this inquiry should be answered in the negative.

Section 169 of the School Code of 1927 places the duty of providing office equipment for the office of the county superintendent of education and his assistants upon the county governing body. Said section provides in pertinent part as follows:

"169. Assistants to County Superintendent, Office, Etc.— *** The County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms and supplies required by the County Superintendent of Education and his assistants."

I find no specific provision of law authorizing the school funds to be used for furnishing office equipment for the office of the county superintendent and his assistants. Since there is no such specific authority, the specific mandate of Section 169 of the School Code should be followed. Cf. **Quarterly Report of Attorney General**, Vol. XIX, p. 233, Vol. I, p. 174.

It is true that the quoted portion of Section 169 of the School Code, *supra*, deals only with the county superintendent and his assistants. However, I am informed by the State Department of Education that the county boards of education use the office or offices of the county superintendent and that said office or offices referred to, either or both, as the office or offices of the county superintendent of education or the county board of education. Therefore, the above reasoning, as applied to the county superintendents of education, likewise is applicable to county boards of education.

The premises considered, it is my opinion that expenditure of the funds in question is limited to legal school expenditures, and there is no authority to use same to purchase office equipment for the county board of education.

The above opinion is based upon the general law. Local acts, which may authorize the expenditure in question, have not been taken into consideration.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 10, 1940.

Hon. M. K. Roper, Secretary,
State Board of Embalming of Alabama,
Montgomery, Alabama.

Alabama Board of Embalmers—

Members of the Alabama Board of Embalmers have no authority to reduce fees for renewal of licenses set by statute and are personally liable for failure to collect full statutory fees.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 17, 1940, in which you request my opinion as follows:

"In August 1939 Hon. Frank M. Dixon, Governor appointed me on the Alabama Board of Embalmers to serve the unexpired term of the late Mr. John J. Diffly, at which time Mr. H. B. Dowling of Eufaula, Ala. was Secretary of the Board, at the regular meeting of the Board in April 1939 the Board reduced the renewal fee from \$5.00 a year to

\$3.00. I want your opinion on this, and will I be liable for the action of the Board as I have been elected as Secretary for the year 1940.

"The State Board of Embalming operates under the provision of Section 688, page 689, Code of 1923 as amended."

From the facts stated in your request for an opinion, it appears that in April, 1939, prior to your appointment to the Alabama Board of Embalming, this board, of its own accord, reduced the fee for renewal of registration from \$5.00 as provided by law, to \$3.00. In August, 1939, you were appointed to fill the term of the late Mr. John J. Diffly. On or before October 1, 1939, licenses were renewed to the embalmers of this state in accordance with the provisions of Section 694 of the Code as amended in 1931 by Act No. 696, S. 247, approved July 31, 1931 (General Acts, 1931, page 822) but at the reduced fee of \$3.00.

You were, therefore, not a member of the board when it agreed to reduce the renewal fee; but you were a member of the board at the time licenses were renewed in October, 1939.

The State Board of Embalming being of statutory creation, has no powers other than those conferred by the statute creating it. (Wright v. Aldridge, 219 Ala. 632, 123 So. 33). The section most pertinent to the situation existing here is Section 694 as amended by the Acts of 1931, supra, which provides as follows:

"Section 694. Annual dues.—On or before the first day of October of each year every licensed embalmer must pay to the state board of embalmers a fee of five dollars for the renewal of registration as a licensed embalmer and shall receive a certificate thereof. In case of default in payment of such fee for a period of thirty days the registration of each person so in default as a licensed embalmer and license therefor, shall be automatically revoked until the person so in default shall have paid to said board the fee of five dollars for the renewal of registration and the additional sum of five dollars. All expenses salary, and per diem to members of this board shall be paid from fees received under the provisions of this chapter and shall in no manner be an expense to the state. All moneys received in excess of said per diem allowance and other expenses provided for, shall be held by the said board as a special fund for meeting the expenses of said board."

This section makes it mandatory on the board to collect \$5.00 from each embalmer for the renewal of his registration as a licensed embalmer. Neither in this section nor in any other section of Chapter 21 or the amendment thereto is authority found for the board to reduce the renewal fee. The board thus acted without the scope of its authority when it reduced to \$3.00 the fee set by statute at \$5.00.

If renewed licenses were not issued at the reduced fee, no liability for this unauthorized act ensues; but since the date for renewal is set by the statute as on or before October 1, of each year, I assume that licenses were renewed this year at the reduced fee. The question now remains: Who is liable for the money which it was the duty of the board to collect but which it failed to collect?

Section 693 of the Code of 1923, as amended, provides that the board shall issue the original license. Section 694, *supra*, makes no specific provisions as to who shall issue the renewal licenses, so we may assume that the board as a whole is responsible for the collection of the renewal fee and issuance of the renewal licenses. Section 691, as amended by the Acts of 1931, *supra*, set out the powers and duties of the board and provides, *inter alia*, for the election of a president and secretary but does not define their duties.

It is my opinion, therefore, that since the law provides that the board shall issue licenses and receive fees, all those members of the board who affirmatively voted to reduce the renewal fees are liable for failure to comply with the mandatory terms of Section 694, *supra*. Authority for holding officers liable for their unauthorized acts are found in the following cases:

Eatterton v. Prima County, 271 Pac. 720,

Walton v. Colmer, 147 So. 331,

Hartford Accident and Indemnity Co. v. Wainscott, 19 Pac. 2nd, 328,

White v. Crandon, 156 So. 303,

People v. Mitchell, 223 Ill. App. 8,

Brown v. Reeves, 92 So. 825, 129 Miss. 755,

Harbin v. O'Rear, 121 So. 527, 219 Ala. 173,

E. I. Dupont De Nemours & Co. v. Combs, 56 S. W. 2nd, 523,

Irving Trust Co. v. Conway, 167 At. 680.

You, as secretary of the board, are not liable for the entire amount or any part thereof since the statute does not make it solely your duty to collect fees and issue licenses; and since you were not a member when the board voted to reduce the fee, you are not liable for the entire amount or any part thereof as having affirmatively participated in the board's action of reducing the fee. (Myers v. State, 278 Pac. 1106).

The extent of the board's liability is the difference between the renewal fee actually collected and the renewal fee required by statute.

Although you personally are not liable for any part of the uncollected renewal fees and since the members of the board who affirmatively voted this unauthorized reduction apparently can be held liable if the remainder is not collected, it would be my suggestion that the board make every effort to collect from the individual embalmers of the state the remaining \$2.00 owed by them.

The law provides that failure to pay the renewal fee of \$5.00 within 30 days after October 1 of each year automatically revokes the license of the

delinquent embalmer. It seems clear, therefore, that the embalmers who renewed their license for \$3.00 are liable to pay the remaining \$2.00 to the board or forfeit their license. Every effort should, therefore, be made by the board to collect the full fee of \$5.00 from each embalmer whose license was renewed this year.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 10, 1940.

Hon. John C. Curry, Commissioner,
Department of Revenue,
Capitol.

Sales Tax—Enforcement and Collection Costs—Circuit Clerks—

Fees of a circuit clerk for the enrollment of warrants issued by the State Department of Revenue under provisions of the Sales Tax Acts of 1937 and 1939 held payable by the State Department of Revenue from the funds collected under provisions of said Sales Tax Acts.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 27, 1940, in which you request my opinion as follows.

"I am herewith attaching to this letter certain statements which have been furnished me by the Circuit Clerk of Etowah County, requesting that I direct the payment of these various cost bills. These bills are for recording warrants issued under Section 11 of the General Acts, Extraordinary Session, 1936-37, p. 125, and the writs of execution issued under Section XX of House Bill 82, approved February 8, 1939. Some of these writs and warrants were returned by the Sheriff with the notation thereon, 'No property found.' Certain others of the warrants or writs were collected, some by levy and some without levy and sale.

"Will you kindly give me your opinion in answer to the following questions:

"1. Are these fees payable by the State under either or both Sales Tax Acts?

"2. Are these fees part of the costs of the writ and thus collectible by the sheriff from the taxpayer?

"3. Are these fees payable irrespective of whether the State realizes any amount on the warrant or writ?

"Please return the enclosures for our file."

I prefer to consider your question numbered 2 before replying to your questions numbered 1 and 3.

The question of whether or not the compensation due the circuit clerk for copying the writ under consideration may be collected from the taxpayer, presents the question of whether or not a valid judgment for these costs exists.

A well settled principal of the law states that no costs may be collected except in pursuance to a valid judgment therefor. See **Hendon v. Delvichio**, 137 Ala. 594. See also Quarterly Report of Opinions of the Attorney General, Vol. XIV, pages 186 and 188. Neither of the Sales Tax Acts named authorize the collection of the costs of recording the warrants named by you from the taxpayer. I find no provision of law purporting to authorize judgment for this cost by the procedure named, therefore, in my opinion, no such judgment may exist in the absence of a suit at law and an adjudication of a court of competent jurisdiction for such costs. They cannot be collected from the taxpayer as a part of the writ under execution.

In reply to your first question, it is my opinion that the costs of recording the warrant named by you is a part of the costs of the administration or enforcement of the provisions of the acts named and may be paid from the proceeds derived pursuant to the enforcement of the said Sales Tax laws. I wish to refer you to an opinion of the Attorney General addressed to Mrs. W. Lee Stanley, Clerk of the Circuit Court, Colbert County, Tusculumbia, Alabama, under date of January 8, 1940, reported in Quarterly Report of Opinions of Attorney General, Vol. XVIII, page 22.

In reply to your third question, it is my opinion that the clerk's fee for recording the warrant named by you in your request may be paid by the State Department of Revenue from the proceeds collected under the provisions of the above named Sales Tax act regardless of whether or not the State recovers anything by the action taken.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1940.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Counties—Reclassification—Judge of the County Court of Pickens County—

Judge of Probate of Pickens County will not be entitled to increased compensation as Judge of the County Court until sometime during the year 1943.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of July 3, 1940, in which you request my opinion as follows:

“Section 3802 of the 1923 Code of Alabama fixes the salaries of Judges of the County Court.

“The Federal Census of 1930 gave Pickens County a population of less than twenty-five thousand, but the 1940 Federal Census gave the county a population of twenty-seven thousand six hundred sixty-eight, which would entitle the Judge of the County Court of Pickens to an increase of \$12.50 per month, or \$150.00 per annum.

“I shall be glad to have you advise me when I shall be legally entitled to this increase.”

In my opinion, you will not be entitled to the increased compensation until sometime in 1943. Your compensation, as Judge of the County Court, is governed by Section 3802 of the 1923 Code of Alabama, which provides as follows:

“3802. Compensation of judges of county court.—Except as is otherwise provided by statute, since the 18th day of September, 1915, there shall be paid out of the county treasury to the judge of the county court, an annual salary in equal monthly installments of three hundred dollars in counties having less than twenty-five thousand population and in counties having twenty-five thousand population and less than thirty-five thousand population four hundred and fifty dollars, and in counties having more than thirty-five thousand population, six hundred dollars, which shall be in lieu of all fees or compensation allowed by law to such county court or judge for services rendered in and about such county court; the payment of such salary to be by warrant of such judge drawn on the treasury of the county; **the population to be determined by the last federal census** preceding the time of the payment of fees. This sec-

tion shall not repeal any statute passed since the 18th day of September 1915, which fixed the compensation or salary of judges of county courts." (Emphasis supplied)

Act No. 233, S. 221, approved August 16, 1939 (General Acts, 1939, p. 388) provides as follows:

"Section 1. That the ninetieth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

Constitutional Amendment No. 12, H. 22, passed by the Senate and House of Representatives as amended March 29, 1939, ratified July 21, 1939, provides in part as follows:

" *** 'The Legislature shall convene on the second Tuesday in January next succeeding their election and shall remain in session for not longer than ten consecutive calendar days. No business can be transacted at such sessions except the organization of the Legislature, the election of officers and the appointment of standing committees of the Senate and the House of Representatives for the ensuing four years.

* * *

"The Legislature shall convene in regular sessions on the first Tuesday in May of 1943 and on the first Tuesday in May in each second year thereafter, until the date of meeting shall have been changed by Act of the Legislature and approved by the Governor."

I understand that the 1940 federal census will not be published until next November. The reclassification date for Pickens County, as provided by Act No. 233, supra, will on the ninetieth day after the first day of the next regular session of the Alabama Legislature which will be held in 1943.

"Where a statute is plain and unambiguous, there is no room for reconstruction." *Alabama-Southern Digest, Vol. 25, Statutes, Key No. 190*, and cases cited thereunder.

The premises considered, it is therefore my opinion that you will not be entitled to your increased compensation until sometime during the year 1943.

I understand that Act No. 233, supra, has not been brought forward in the new Alabama Code. If my information is correct, the adoption and proclamation of the new code will perhaps necessitate a reconsideration of this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1940.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Counties—Gasoline Fund—

1. County may use not exceeding one-third of its share of State-levied gasoline to pay principal and interest on road and bridge bonds and warrants issued exclusively for the maintenance, repair and construction of roads and bridges within said county.

2. A proper resolution authorizing such payment should be adopted by the county governing body, which should be properly entered on its minutes. When this is done the probate judge is authorized to issue warrants against the gasoline fund in accordance therewith.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 21, 1940, in which you request my opinion as follows:

"Please advise:

"First: If the interest on Road and Bridge Bonds or other outstanding indebtedness can be paid out of the Gasoline Fund?

"Second: If the obligation such as outstanding interest bearing Warrants can be paid out of this fund.

"Third: If it is necessary that the Commissioners make a minute entry authorizing such payment, if such payments are legal.

"Fourth: If the interest bearing obligation is due can I as Judge of Probate issue warrant against the gasoline fund in payment of such obligation."

In a long distance telephone conversation with you relative to clarifying the above inquiries, you advised that the road and bridge bonds and the outstanding warrants in question were issued exclusively for the purpose of maintenance, repair and construction of roads and bridges in your county and that your inquiries pertained only to the principal and interest due on said bonds and warrants. Therefore, this opinion will be confined to the road and bridge bonds and warrants issued in accordance with the above.

In answer to your first and second inquiries, it is my opinion that the county may use not exceeding one-third part of its share of the State-levied

gasoline tax to pay the principal and interest on the road and bridge bonds and warrants issued exclusively for the maintenance, repair and construction of roads and bridges in the county.

An opinion of this office rendered to the Judge of Probate of Chambers County on February 1, 1939 (*Quarterly Report of Attorney General*, Vol. XIV, page 89), based on the case of *Herbert v. Perry et al.*, 235 Ala. 71, 177 So. 561, held that county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of the State excise tax on gasoline, to obtain funds to be used in the construction and maintenance of county roads and bridges.

Said opinion also held that under the authority of Act No. 51, H. 61, approved March 26, 1936, General Acts, 1936, page 28, and Section 1397(110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts from the State excise tax on gasoline, to pay valid outstanding claims incurred on account of the construction and maintenance of public roads and bridges in the county, without regard to whether incurred before or after the passage of the 1936 act. Act No. 51, *supra*, provides as follows:

"Section 1. The Board of Revenue or Court of County Commissioners or other governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been heretofore incurred by such county for the construction and/or maintenance of roads or bridges.

"Section 2. All expenditures heretofore made for the purposes and from the funds named in Section 1 of this Act are hereby ratified.

"Section 3. This act shall become effective upon its passage and approval.

"Approved March 26, 1936."

It will be noted that the use of the gasoline tax received by the counties for the payment of indebtedness incurred is limited to an amount not exceeding one-third of the amount so received. *Quarterly Report of Attorney General*, Vol. XVII, page 202.

See also *Lyon v. Shelby County*, 235 Ala. 69, 177 So. 306; *Isbell v. Shelby County*, 235 Ala. 571, 180 So. 567; *Quarterly Report of Attorney General*, Vol. XV, page 93; *Quarterly Report of Attorney General*, Vol. XVI, page 262.

A county having the authority to contract may engage to pay interest on a warrant validly issued. Such comprehends the engagement for and the payment of interest as an incident to the principal obligation validly assumed. *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448; *Stone v. State*, 204 Ala. 13, 85 So. 443; *Quarterly Report of Attorney General*, Vol. X, page 60.

The premises considered, it follows that the county may use not exceeding one-third part of its share of the State-levied gasoline tax to pay principal and interest on road and bridge bonds and warrants issued for the maintenance, repair and construction of roads and bridges within the county, as above stated.

In answer to your third and fourth inquiries, it is my opinion that before the warrants against the gasoline fund are issued for the payment of the principal and interest on the bonds or warrants in question, it will be necessary for the county governing body to pass a resolution to that effect, which should be properly entered upon its minutes. When this is done, you, as Judge of Probate, would have authority to issue the warrants in question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 12, 1940.

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Counties—Court of County Commissioners of Marion County may appropriate county funds for a club house to be used by the county agricultural clubs in the promotion of agriculture within the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion dated July 3, 1940, is as follows:

"In this county we have 22 boys 4-H clubs, 21 girls 4-H clubs, 15 home demonstration clubs, 6 Future Farmers of America clubs, 4 mens agricultural clubs, and County Agricultural Club composed of workers in Farm Security Administration, Agricultural Adjustment Administration, Vocational Agriculture and Health Unit.

"Certain public spirited citizens of this county are furthering a plan in connection with the National Youth Administration for the construction of a clubhouse near Hamilton to be used in the main by these various agricultural clubs, and the Court of County Commissioners of our county is in sympathy with this movement and this court would like to make a contribution in the way of an appropriation to help construct this building. I would like for you to advise me officially if the Court of County Commissioners is authorized under the law to make an appropriation from the general funds of the county for this purpose. If

it is convenient for you to do so, I would appreciate an early opinion from you on this matter."

In my opinion your question should be answered in the affirmative.

Subdivision 23 of Section 6755 of the 1923 Code of Alabama, as amended, provides as follows:

"6755. The court has authority:— ***

"23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

This office has held that county governing bodies under the general law have authority to appropriate county funds for:

(a) Installing and maintaining an exhibit of the agricultural resources of the county. **Biennial Report of Attorney General**, 1936-1938, page 445.

(b) Soil erosion and the promotion of agriculture. **Biennial Report of Attorney General**, 1934-1936, page 294.

(c) To build a market house for the purpose of promoting agriculture. **Biennial Report of Attorney General**, 1934-1936, page 201.

(d) To carry on the work of the Farm Demonstration Agent. **Biennial Report of Attorney General**, 1930-1932, page 862.

(e) The extermination of insects on satsuma trees and the promotion of the same. **Biennial Report of Attorney General**, 1928-1930, page 57.

(f) A community or school fair. **Biennial Report of Attorney General**, 1926-1928, page 279.

This office has held that the proceeds going to the counties from sales tax may be used for the construction of buildings to be used by the Public Health Department, Public Welfare Department and the Agricultural Extension Service in cooperation with these state agencies and/or federal government. **Quarterly Report of Attorney General**, Vol. XVII, page 259.

I understand that the 4H Clubs and the other agricultural clubs referred to in your letter are the instrumentalities in the counties through which Alabama Agricultural Extension Service reaches the future farmers of the State and by their club work the future farmers are taught the best methods of farming, thereby promoting agriculture within the different counties of the State.

In my opinion, subdivision 23 of Section 6755, supra, provides the express authority for you to make the appropriation for the club house to be used by the various farm clubs in the promotion of agriculture within the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1940.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Justices of the Peace—Docket Books—

Cost of docket books required by law to be kept by justices of the peace payable from county funds (Sections 8793-8794, Code of 1923).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of April 12, 1940, in which you request my opinion as follows:

"Please advise me if the County has authority to buy a docket book for a Justice of the Peace of the County."

In my opinion, your inquiry must be answered in the affirmative.

Sections 8793 and 8794 of the Code of 1923 provide as follows:

"8793. Blanks furnished justices of the peace by probate judges.—Judges of probate shall furnish the necessary blanks to justices of the peace, notaries public, and ex-officio justices of the peace and constables in their respective counties, that are required to transact the business in their respective courts and report the cost of same to the commissioners' court or board of revenue in their respective counties for settlement."

"8794. Payment for blanks, by commissioners' courts.—Upon filing the cost of said blanks in the commissioners' court or board of revenue, the commissioners' court or board of revenue shall draw warrant on the county treasurer to cover the cost of said blanks out of the funds from which the books and blanks of other county officials are paid."

By Section 3850, Code of 1923, justices of the peace are requested to keep a docket of all criminal cases tried, on which is shown the nature of each case, the judgment rendered therein, etc., which he is required periodically to present to the grand jury for its inspection.

By Section 8706, Code of 1923, justices of the peace are required to keep a docket of all civil cases.

In view of these provisions of law, it is my opinion that the dockets required to be kept by justices of the peace are included within "the necessary blanks * * * that are required to transact the business" in justice of the peace courts, and that Sections 8793 and 8794 of the Code, supra, afford ample authority for the payment of the costs of such dockets from county funds. Cf. Biennial Report of Attorney General, 1928-30, page 148.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1940.

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Statutes—Local Acts, 1933, page 36—General Acts, 1936-1927,
page 357—

A general act authorizing counties to publish semi-annual statements did not repeal a local act requiring county governing body Henry County to publish monthly statements.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 3, 1940, in which you request my opinion as follows:

"Section 6 of Local Acts of 1933 found at page 36 thereof reads as follows:—

"That it shall be the duty of the said Court of County Commissioners, to have published in some newspaper or newspapers published in said County, not later than the 15th day of each month, a complete itemized statement of all disbursements of County funds made through and by the orders of said Court * * *"

"In carrying out the provisions of this Section of said Act it cost Henry County the sum of \$335.97 for the fiscal year ending Sept. 30, 1939, which is revealed in the Examiners of Accounts report. This sum, in my opinion, is excessive for the good it accomplishes.

"My question: Does the Act of the Extra Session 1936-37 found at page 258 requiring a semi-annual publication of the receipts and expenditures of the County supersede the local act above referred to?"

I call your attention to Section 6 of Act No. 122, H. 301; approved April 10, 1933 (Local Acts, 1933, page 37). applicable only to Henry County, which provides:

"Section 6. That it shall be the duty of the said Court of County Commissioners, to have published in some newspaper or newspapers published in said County, not later than the 15th day of each month, a complete itemized statement of all disbursements of County funds made through and by the orders of said Court, for the preceding month, showing the name of each person, firm or corporation receiving any part of said funds so disbursed and the purpose for which same was expended."

Act No. 216, H. 158, approved March 2, 1937 (General Acts, 1936-1937, page 258), provides:

"Section 1. That Section 6766 of the Code of Alabama of 1923, be amended so as to read as follows: 6766—The Courts of County Commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first days of April and October of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended. Said publication must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable."

An examination of Section 6766 of the Code of 1923 discloses that the above amendatory act merely changed the dates of publication of the semi-annual statements from the first day of January and July of each year to the first day of April and October of each year. Act No. 122, supra, was enacted subsequent to the adoption of Section 6766 of the Code of 1923, and clearly evinces a legislative intent to require the governing body of Henry County to publish monthly statements instead of semi-annual statements.

General laws dealing with a subject are not to be construed as repealing special laws dealing with the same subject. *City of Mobile v. Marx and Co.*, 75 Fed. (2d) 569. A general statute does not repeal a local one unless such is the plain legislative intent, even when they may contain somewhat inconsistent provisions. *State v. White*, 160 Ala. 168, 49 So. 78; *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159; *Board of Revenue v. Johnson*, 200 Ala. 533, 76 So. 859.

A general law does not repeal a special or local law unless repeal is expressly provided for. **Cooper v. State**, 187 So. 500, cert. den. 237 Ala. 533, 187 So. 503; **Reid v. Wallace**, 27 Ala. App. 199, 168 So. 900; **Tucker v. McLendon**, 210 Ala. 562, 98 So. 797.

In the construction of the laws the courts are not to regard the supposed wisdom or want of wisdom of such laws, but the object sought to be accomplished and the appliances by which that objection may achieve. **Horton v. Mobile School Commissioners**, 43 Ala. 598.

It will be observed that Act No. 216, supra, is a general law and contains no repealing clause.

The premises considered, and on the authorities cited herein, I am of the opinion that Act No. 216, supra, does not repeal Act No. 122, supra, but that said Act No. 122 is still in full force and effect in Henry County.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 12, 1940.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Notaries Public—Qualifications, etc.—

1. Notary Public must be a qualified elector.
2. Probate judge not under duty to inquire into the eligibility if an appointment of the Governor.
3. Court of county commissioners to approve bond of notary public.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 28, 1940, in which you request my opinion as follows:

"Kindly refer to your biennial reports for 1926-28, Page 632, wherein a former Attorney General held that a Notary Public must be a qualified elector, and please advise me if this ruling holds good to date.

"There are many applicants for appointment as Notary Public who are young women under the age of twenty-one (21), as well as some men who are not qualified electors either by reason of a failure to register, or lapse of poll tax. I would like to know if when the appointment is made and a bond is presented to this office, if the burden is on the Probate Judge to determine such qualifications and if not found to be a qualified elector, to refuse to certify such persons' name to the Secretary of State for a commission.

"I know that it has been a general practice, not only in this County but in a number of counties in the State for a number of years, to certify persons for appointment and the commission for Notary Public when such persons were not on the list of qualified electors."

Our first consideration is directed to whether or not a notary public must be a qualified elector. It is my opinion that the inquiry should be answered in the affirmative.

The Supreme Court stated in *Governor, use, etc., v. Gordon*, 15 Ala. 72, that:

"A notary public who receives his appointment and commission from the Governor of the state, upon recommendation of the judge of the county court, must be regarded as a public officer of the county."

A vast number of cases decided throughout the land are in accord with the decision above, i. e., that a notary public is a public officer. See Annotation to *North Carolina v. Watson*, 201 N. C. 661, 161 S. E. 215, in 79 A. L. R. 449; *Pitsch v. Continental and Commercial National Bank of Chicago*, 25 A. L. R. 164; *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 51. A good summarization of these holdings is in *Brickett v. Knight*, 85 S. E. 418, 169 N. C. 333, where the court stated:

"It seems therefore to be established by every test that can be applied that * * * the position of notary public has been a public office."

Therefore, since a notary public is a public office, the State may regulate or restrict it. *Davis v. Teague*, 220 Ala. 309, 125 So. 51; *Ex parte Bullen*, 236 Ala. 56, 181 So. 498. Section 2575 of the Code of Alabama of 1923 sets out the qualifications of office holders, Number 1 therein being the requirement that the office holder be a qualified elector. Therefore, it is my opinion that a notary public must be a qualified elector.

The following opinions reaching the same conclusion are hereby cited with approval:

Opinion to Probate Judge of Butler County under date of September 25, 1929, Biennial Report of Attorney General for 1928-30, page 623;

Opinion to Hon. John C. Anderson, under date of June 18, 1928, Biennial Report of Attorney General, for 1926-28, page 606;

Opinion to Probate Judge of Russell County, under date of June 29, 1928, Biennial Report of Attorney General, 1926-28, page 632.

We now come to a consideration of your second inquiry as to whether or not you, as Probate Judge, should inquire into the eligibility of the appointee for notary public. It is my opinion that this inquiry should be answered in the negative.

Section 168 of the Constitution of 1901 reads in pertinent part as follows:

“* * * the Governor may appoint notaries public * * *.”

Section 9338 of the Code of Alabama of 1923 reads in pertinent part as follows: “* * * Notaries public * * * are appointed by the Governor * * *.” From this it appears that the sole appointing power of notaries public lies with the Governor. It is for him to determine the eligibility of the appointee for the position. Where the appointment is regular on its face and emanates from a source which has the legal or constitutional right to bestow it, the appointment is voidable only. *Thompson v. State*, 21 Ala. 48. Therefore, it is my opinion that no duty to inquire as to eligibility of the appointee to receive the appointment as a notary public is placed upon you, as Probate Judge. See *Gorce v. Wadsworth*, 91 Ala. 416, 418, 8 So. 712.

From your inquiry, I note that you state, “When the appointment is made and a bond is presented to this office * *.” Since the opinions of this office over a period of some five or six years are in conflict on the question of what authority approves the bond of a notary public, I think it wise to consider them in connection with your request and to determine my interpretation of the statutes in this regard.

Section 9241 of the Code of Alabama of 1923 provides that notaries public must file a bond in the office of the judge of probate and have same approved by him. Cf. Opinion to Judge of Probate of Covington County, under date of January 17, 1929, Biennial Report of the Attorney General for 1928-30, page 136.

In 1933 the Legislature passed Act No. 191, H. 344, approved April 20, 1933, General Acts, 1933, page 203, commonly called the Bains Act, further regulating the bonds of county officials. In our opinion to the Board of Revenue of Barbour County, under date of January 14, 1938, Quarterly Report of Attorney General, Vol. X, page 50, this office held that bonds of notaries public (commercial) were not within the purview of the Bains Act, *supra*, and the bonds thereof should be approved by the judge of probate under Code Section 9241, *supra*.

It is my opinion that the above opinion is laid in error and that the opinion to Hon. J. F. Laseter, under date of September 20, 1935, Biennial Report of Attorney General, 1934-36, page 301, is correct. This opinion holds that the bonds of notaries public are within the cognizance of the Bains Act, *supra*, and therefore are to be approved by the court of county commissioners.

The title of the Bains Act reads in pertinent part: “To further regulate, provide for and require bonds of county officials * * *.”

Section 1 of the Bains Act reads in part apropos:

"Sec. 1. That all county officials, as set forth in this Act, of all counties of this State shall be required to execute official bonds * * *."

Section 14 of said act reads as follows:

"Section 14. The official bonds of Justices of the Peace, Notaries Public and Ex-Officio Justices of the Peace, Notaries Public, Constables and County Surveyors shall be, as to each officer, in the sum of \$1000.00 the premiums on said bonds to be paid by the person making such bond and without expense to the County."

From the above provisions it appears to me to be beyond question that the legislative intent was to include notaries public within the cognizance of said act. The bond is specifically set out for a notary public, as is shown above.

Furthermore, if it be questioned that a notary public is not a "county official", as the title to the Bains Act reads, I believe that the **Governor, use etc.**, case, cited supra, will suffice to override such contention for it is there stated that a notary public is a "public officer of the county."

In addition to the authorities cited in support hereof in the first part of this opinion, permit me to quote from the footnote to L. R. A. 1915F, page 899:

"Since the earlier notes, it has been held in *State ex rel Gray v. Hodges*, 107 Ark. 272, 154 S. W. 506, that the position of notary is an office within the meaning of a constitutional provision that no person shall be elected to or appointed to fill a vacancy in any office who does not possess the qualifications of an elector."

I therefore think that beyond question a notary public is an officer. If he be an officer, he is an official. The **Governor, use, etc.**, case says he is an officer of the county, therefore, it is my opinion that he is an official of the county.

Since, then, the Bains Act was to regulate the bonds of county officials and since it sets out therein the bond to be made by notaries public, it is my opinion that such come within the purview of Section 3 of said act, which reads as follows:

"Section 3. The Court of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties are hereby authorized and empowered to fix and approve the official bonds of all other county officials and employees in county offices in such an amount or amounts as may in their judgment be necessary for the safety and security of public funds or other funds and as the public interest may demand subject to such limitations as are specifically provided herein and made applicable to each particular county official."

Therefore, you are advised that the bonds of notaries public are to be approved by the court of county commissioners rather than the judge of probate.

The opinions herein cited are modified to conform to the holding of this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 15, 1940.

Hon. J. E. Bryan,
Superintendent of Education,
Jefferson County,
Birmingham, Alabama.

Public Officers and Employees—County Superintendent of Education—National Youth Administrator for the State of Alabama—

1. National Youth Administrator for the State of Alabama is not an "office of profit" within purview of Section 280 of Constitution.

2. Superintendent of Education of Jefferson County may legally serve as National Youth Administrator for the State of Alabama.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated May 4, 1940, is as follows:

"Please refer to Article XVII, Section 280 of the Constitution of the State of Alabama, and give me your answer to the following questions:

"1. 'Can a county superintendent of education serve as National Youth Administrator for the State of Alabama?'

"2. 'If your answer to Question One is in the negative, could a county superintendent serve in this position without profit?'

In connection with the foregoing request, there has been submitted for examination a copy of "Public Resolution No. 24-76 Congress, First Session," cited as "Emergency Relief Appropriation Act of 1939."

Section 2 of said resolution appropriates \$100,000,000 for administration by the National Youth Administration for the purpose of furnishing "part-time work and training to needy young persons who are no longer in regular attendance at school and who have been unable to obtain employment, and to enable needy young persons to continue their education at schools, colleges, and universities."

Under Section 22, subdivision (b), local officers and employees of the State, with the consent of the State, may, for the purpose of carrying out the provisions of the resolution, be employed at such compensation as may be determined by the head of the agency involved, with such authority, duties, responsibility and tenure of office as the head of the agency involved may deem necessary.

It is to be inferred, therefore, that the County Superintendent of Education of Jefferson County, while serving as National Youth Administrator for the State of Alabama, is, with the consent of the Board of Education of Jefferson County, employed by the head of the National Youth Administration and that he holds such office at the pleasure of the latter and is, in fact, merely his employee.

In *State v. Sanders*, 187 Ala. 79, 65 So. 378, the nature of civil offices of profit under Section 281 of the Constitution of Alabama of 1901 was considered at length and in that case at page 83 it was observed:

"Nearly all statutes which, like the ones in question, create public boards or commissions for the management and control of the various departments of government expressly provide for the election or appointment of officers, agents, employees, and servants. The mere fact that these appointees are called **officers** rather than employees, or that the statute says they shall be **elected** rather than appointed or hired, does not make such persons so appointed or elected **officers**, * * *."

Again on page 84 of said opinion, it was further observed:

"No part of the sovereign power of the state is by the statute delegated to appellee, although he is named in the statute as the 'state health officer.' The delegation of such authority and power is to the 'state board of health,' which is appellee's creator and master, whom he serves. He does not serve the state; he serves the board which elects him."

In *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211 and in *State ex rel. Horn v. Wilkinson*, 220 Ala. 38, 124 So. 213, it was held that the respondent, Wilkinson, did not hold two offices of profit at one and the same time contrary to Section 280 of the Constitution of 1901 because of the fact that as to one of said offices he was a mere employee rather than an officer within the meaning of said section of the Constitution. I am of the opinion, therefore, that inasmuch as neither the term of office nor the compensation of the National Youth Administrator for the State of Alabama is fixed by law, his office is not an office of profit within the meaning of the Constitution of Alabama.

The same question has been discussed at length in former rulings and opinions of this office. Reference is made to an opinion dated March 14, 1940, to Hon. F. E. St. John, Chairman, Democratic Executive Committee, Cullman County, Quarterly Report of Attorney General, Vol. XVIII, page 316.

The position which you hold as National Youth Administrator for the State of Alabama is unlike that of United States Marshal, which was con-

sidered in a recent opinion of this office wherein it was held that Hon. Raymond Thomason could not legally hold membership on the Jefferson County Board of Education and the office of United States District Marshal at one and the same time.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

July 15, 1940.

Hon. William H. Thomas,
Chairman, Executive Committee
of the Board of Trustees,
Alabama Reform School,
Mt. Meigs, Alabama.

Alabama Reform School for Juvenile Negro Lawbreakers—Paroles

Pardon and Parole Act of 1939 (Act No. 275, S. 186, approved August 25, 1939—General Acts, 1939, page 426) does not affect the pardon and parole system adopted by such negro reform school.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 9, 1940, in which you request my opinion as follows:

"Since the new system of parole has been instituted in the State of Alabama, the question has arisen as to whether or not it has any effect on the Alabama Reform School for Juvenile Negro Lawbreakers. We are of the opinion that this school is operated as a separate corporation from the State of Alabama, and its governing powers are to be determined by the Board of Trustees. At the present time this school issuing the same system of parole it used before the new parole law was passed, that is to say that the President of the Institution recommends to the Chairman of the Executive Committee and if the Chairman of the Executive Committee approves said recommendation, then it is sent on to the Governor for his approval. We would thank you to give us an official opinion as to whether or not the new parole system has in any way affected this institution."

In my opinion that Act creating the State Board of Pardons and Paroles, (Act No. 275, S. 186, approved August 25, 1939, page 426), affects in no manner the procedure followed by the Alabama Reform School for Juvenile Negro Lawbreakers in releasing negroes committed to such institution. A reading of Act No. 275 reveals at once that its purpose was to provide a

method of parole and supervision of **prisoners** serving sentences in the "**jails and prisons** of this state." This act was enacted pursuant to the amendment to Section 124 of the Constitution of Alabama proposed by Act No. 8, S. 4, passed by the Senate and House of Representatives as amended on March 29, 1939 (General Acts, 1939, Special Session, page 8), and ratified July 11, 1940. This amendment gave the Legislature the power to provide for and to regulate the administration of pardons, paroles, etc.

It has been repeatedly held by the courts of this state that children convicted and sentenced to detention homes such as the Alabama Reform School for Juvenile Negro Lawbreakers, are not criminals—the real purpose of statutes creating the courts which commit them and the statutes creating the institutions themselves being, not to provide punishment, but to save the child from becoming a criminal. This is well stated in case of *Prince v. State*, 19 Ala. App. 495, 98 So. 320, as follows:

"(1, 2) It has been generally held that statutes creating courts having jurisdiction of juvenile offenders are in no sense criminal, and are not intended to provide punishment, but the real purpose is to save the child from becoming a criminal. *Macon v. Holloway*, (Ala. App.) 96 So. 933. Therefore these statutes are not violative of the Constitution, even though they do not provide for trial by jury. In other words, such statutes are not penal in their nature, and commitment under them to public institutions, such as the judgment here provides, 'to the Boy's Detention School at Mobile, Ala.' is not in the nature of punishment. On this subject we note in 1 Wharton's Criminal Law (11th Ed.) p. 473:

"The provision of the statute is a provision by the state, under necessity, as *parens patriae*, for the custody of neglected children, incorrigible, or criminally inclined children, and is intended to supply to them that parental custody and care and restraint which their welfare, and the interests of the state in the welfare of the children, require, which parental custody, or the parental right to the custody, the parents have for any reason surrendered or lost.'"

Such a custodial institution is the Alabama Reform School for Juvenile Negro Lawbreakers (See Alabama School Code of 1927, Sections 709-720). The purpose of the school is expressed in Section 711 as follows:

"Section 711. Purpose of School.—The school is established for the proper education and training of juvenile negro law breakers, as may be lawfully committed to it. The course of instruction in the school shall include a common school education, with a thorough training in agriculture and industries, and giving special attention to moral training so as to make him a self-respecting, industrious, good citizen. No criminal over the age of fifteen years shall be admitted to said institution."

It thus appears that the school is not a "jail" or "prison" and that the inmates are not "prisoners" within the contemplation of Act No. 275, *supra*.

Premises considered, it will be seen that Act No. 275, *supra*, creating a State Board of Pardons and Paroles was not intended to affect the pro-

cedure set up by your institution under authority given in Section 718 of the Alabama School Code of 1927 to make such rules and regulations as may be needful to the successful operation of said school.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 16, 1940.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Court of County Commissioners—Heating, Cooling and Ventilating Courthouse—

Courts of County Commissioners have authority to purchase and install heating, cooling and ventilation systems for their courthouses provided that such units are permanently affixed to and a part of the building.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of June 10, 1940, in which you request my opinion as follows:

“Please give me your official opinion on the following questions:

“1. Under the provisions of Chapter 16 Article 5, Code of Alabama, 1923, particularly Section 210, (and Chapter 16 Article 6, Code of Alabama, 1923, particularly Section 230) can the County Board of Commissioners install complete air conditioning in the court house?

2. Can the County Board of Commissioners, under authority of the above mentioned sections, purchase and install electric fans to the walls of a room in the court house, being used in part by the Probate Judge and in part by a W. P. A. project engaged in recopying court records, under sponsorship of the County Board of Commissioners and Probate Judge, (under authority of Section 9584, Code of Alabama, 1923)?

“3. Can the County Board of Commissioners receive credit on an examination of said office by the State Examiners for the period October 1st, 1938 through September 30, 1939, for an electric fan purchased May 20, 1939, which was several months later, but prior to the examination, permanently affixed to the wall of the record room connected with the probate office?”

Your request presents the question of the power of the Court of County Commissioners to buy electric fans, to install a cooling and/or heating system, and to provide a proper ventilating system for the courthouse.

The former opinions of this office deny the authority to purchase electric fans, on the assumption that a Court of County Commissioners may not expend money for any purpose unless express or implied authority is given by statute. These opinions have specifically held that the purchase of electric fans is unauthorized: Biennial Report, 1928-1930, page 981; Biennial Report 1930-1932, page 983; Quarterly Report, Volume XVI, page 177. The only other opinion on the same subject (Quarterly Report, Volume XVII, page 232) reaches an opposite conclusion but is governed by a special statute not here applicable.

The opinions cited above are based on Section 9664 of the Code of 1923 and on Section 231 of the Code of 1923, both giving authority to furnish "office supplies," and hold that an electric fan is not included within the meaning of the term "office supplies." This opinion does not overrule or modify the opinions set out above so far as they deal with movable electric fans not permanently affixed to and a part of the building.

It is an elementary principle of law that when authority is given to a person or to a commission, that person or commission has the authority to do all things reasonably necessary to accomplish this particular act. (*McCullough v. Maryland*, 4 Wheat. 316; *Swindle v. Crocker*, 217 Ala. 199, 115 So. 252).

Section 210 of the Code of 1923 provides:

"Section 210. County buildings erected and repaired by county.—The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the court of county commissioners which court is authorized to make all necessary contracts for that purpose."

The words "county buildings" in this section may be reasonably construed to include courthouse, thus the Court of County Commissioners has statutory authority to "erect, keep in order, and repair," the courthouse.

If the Court of County Commissioners were erecting a new courthouse, they would have wide discretion in planning for the heating, cooling, and ventilating of the building. (*State rel. Day v. Bowles*, 217 Ala. 458, 116 So. 662). Surely they could install a furnace of any type they deem suitable, or they could install a combination heating and cooling system or a cooling system entirely separate from the heating unit. They could also install ceiling fans or any other permanent system for cooling or ventilating which seemed to them suitable.

If they have authority to build their courthouse as they see fit, it would seem that they should have the power to remodel, enlarge, or repair the building to the same extent. (Biennial Report, 1926-1928, page 716; Biennial Report, 1930-1932, page 423; *VanDerveer v. Strickland Bros. Machine Company*, 16 Ala. App. 677, 81 So. 197; *State ex rel. Wahl v. Spear*, 223 S. W. 655).

Section 212 of the Code of 1923, which specifically gives authority to erect courthouses, provides:

"Section 212. Erection of county buildings.—The courts of county commissioners and boards of revenue of the respective counties shall erect courthouses, jails and hospitals, and other necessary county buildings; and such courts and boards have authority to levy a special tax for that purpose. In counties in which a circuit court or court of like jurisdiction has been or is hereafter authorized to be held in more than one place, the court of county commissioners or board of revenue may build courthouses in each place of holding court, and in all counties wherein a circuit court or court of like jurisdiction is authorized to be held or may hereafter be authorized to be held in more than one place for six month or more during any year the court of county commissioners or board of revenue of such counties shall erect a courthouse and jail at each of such places where such court is held, **such courthouses and jails to be adequate and commodious for the business of such court and county at such place**, but this section shall not affect in any wise any local law heretofore enacted that is not in conflict herewith." (Emphasis supplied)

It is to be noted that the first sentence provides for the erection of all courthouses, apparently making specific what is found in general terms in Section 210, *supra*. The clause, " * * * and in all counties wherein a circuit court or court of like jurisdiction is authorized to be held or may hereafter be authorized to be held in more than one place for six months or more during any year the court of county commissioners or board of revenue of such counties shall erect a courthouse and jail at each of such places where such court is held, such courthouses and jails to be adequate and commodious for the business of such court and county at such place * * *," refers to courthouses built to accommodate a court which meets in more than one place in the county, but the words "adequate and commodious for the business of such court and county" are equally applicable to the word "courthouse" used in the first sentence of this section, since it can hardly be claimed that "adequate and commodious" courthouses are to be built only in those counties with two courthouses and not in those with just one.

Webster's New International Dictionary defines the word "adequate" as "suitable" and a courthouse which is not properly ventilated, heated, or cooled may not be a suitable or adequate place for the conducting of the business of the court and county. **This is a matter to be determined by the Court of County Commissioners in the exercise of their own discretion.** (State ex rel. Day v. Bowles, *supra*.)

It is my opinion, therefore, that a Court of County Commissioners has the authority to purchase and install adequate heating and/or cooling equipment, including air-conditioning units, or permanent fans or other ventilating system which may be required to maintain in the courthouse an adequate or suitable place for conducting the business of the circuit court or of the county, and in my opinion the words "business of the county" would include all offices devoted to county affairs which are located in the courthouse. Every part of the courthouse, therefore, which is used for the business of the county may be heated, cooled, or ventilated in whatever manner the Court of County Commissioners, in the exercise of their sound discretion, think best, subject only to one restriction: the method must be permanent and of such a nature as to be classed as a fixture.

In the light of the foregoing conclusion, your requests should be answered as follows:

1. The County Board of Commissioners may install complete air-conditioning in the courthouse.
2. The County Board of Commissioners may purchase and install electric fans in any part of the courthouse if these fans are reasonably necessary for the proper ventilation and are permanently attached to the building.
3. The County Board of Commissioners may receive credit for a fan bought and permanently affixed to the wall of the courthouse record room if such fan is reasonably necessary for the ventilation of said room.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 16, 1940

Hon. Earl Bruner,
Commissioner of Public Improvements,
Jefferson County,
Birmingham, Alabama.

Court of County Commissioners—Authority to contribute to radio program sponsored by the Works Progress Administration—

The Court of County Commissioners has the authority to contribute to a radio program sponsored by the Works Progress Administration and designed to explain the functions and promote interest in the work of this federal relief agency.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 3, 1940, in which you request my opinion as follows:

“Several weeks ago the County Commission of this County participated in a national radio hook-up with the Works Progress Administration and expended in this instance the sum of \$8.50 promoting this program.

“Our County Treasurer has notified this Commission that he has no provisions that he can perform under to pay this bill. It is our

thought that in view of the fact that we are expending money promoting Works Progress Administration activities, this expenditure is of a similar nature and that the County Treasurer would not be liable for this expense if paid.

"The writer, together with the entire Commission, will appreciate very much your rendering an opinion at your earliest convenience in this connection."

It is my opinion that the County Commissioners of Jefferson County may legally appropriate money for a radio program sponsored by the Works Progress Administration.

Former opinions of this office have held that a county may expend money to aid in the promotion of federal relief projects. Quarterly Reports of Attorney General, Vol. X, page 132; Quarterly Reports of Attorney General, Vol. XVII, page 325.

The Works Progress Administration has been held to be a federal relief agency for which county funds may be expended. Quarterly Reports of Attorney General, Vol. XVII, page 325.

The radio program in question was for the purpose of explaining the nature, purpose, and benefits of work done by the Works Progress Administration, both in Jefferson County and over the country as a whole; and was designed to promote interest in Works Progress Administration projects and to acquaint the public with the work which had been done by this agency.

In former opinions it has been held that a county may contribute to the salaries of persons employed by the relief agencies of the federal government, to the rent of office space, and to the general expenses of the offices of such agencies. Biennial Report of Attorney General, 1932-1934, page 595; Biennial Report of Attorney General, 1934-1936, page 661. These opinions hold that contributions to promote the work of federal relief agencies may be made under authority of Section 6755, Sub-section 6, Code of 1923, as amended in 1931 and 1933 (General Acts of 1931, pages 759-762; General Acts of 1933, Extra Session, page 201). This section provides:

"Section 6755.(6) (The Commissioners Court has authority) To make such rules and regulations for the support of the poor in the county as are not inconsistent with any law of the state."

The purpose of the Works Progress Administration is to provide relief and relief work and to increase employment by providing useful projects. U. S. Government Manual, page 339. Such work appears to come under the authority of Section 6755, sub-section 6, supra, permitting the Court of County Commissioners to make provisions for the support and care of the poor, and it has been so held in a former opinion. Quarterly Report of Attorney General, Vol. XVII, page 325.

Since the county has authority to provide for the poor and the Works Progress Administration is an agency through which this may be done, it would seem that the county has the power to expend money for any purpose to aid the Works Progress Administration in its proper function. The

broadcast in question seems to have been designed to promote the work of the Works Progress Administration and, therefore, may be considered as a proper expense for the county and one which may be paid by the Court of County Commissioners.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 17, 1940.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County — Juvenile Court—

Whenever a child is adjudged a juvenile delinquent by the Juvenile Court of said county, said case is placed on the Equity Docket of said court.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated April 12, 1940, follows:

"Referring to an Act of the Legislature known as House Bill No. 1039, approved September 9, 1927, and found in the General Acts of Alabama of 1927, Page 653, creating the Juvenile Court of Mobile County, Alabama, I respectfully request your opinion on the following question, to wit:

"Whenever a child is adjudged a juvenile delinquent by the Juvenile Court of Mobile County and said child appeals to the Circuit Court should the case be docketed on the criminal, equity, or civil docket of the Circuit Court?"

Section 18 of the act creating the Juvenile Court of Mobile County, Alabama, Act No. 571, H. 1039, approved September 7, 1927 (General Acts, 1927, page 653) as amended, is as follows:

"Section 18. Appeal by Juvenile; or others; Release of Child; Appellate Court Authority; Judgment. Within five days after the day of rendition of a final decree by said juvenile court against a child an appeal may be taken by the child, or his next friend, parent, guardian to the Circuit Court in said County in their own name. In no event shall the taking of an appeal release the child from the Court's custody and

control so as to put it at large unless an appeal bond is executed by such appellant payable to said County in a penalty fixed by the Judge or Clerk, with good and sufficient securities or surety, approved by the Judge or Clerk, and conditioned that the child shall appear in said Circuit Court until discharged by due court of law; and the appeal without bond shall not suspend the judgment appealed from, nor discharge the child from the custody of the Juvenile Court or its officers or of the institution, person or persons into whose care the child may have been committed, if the Juvenile Court shall enter an order ascertaining or stating that to suspend the judgment or release the child will endanger the child's welfare and ordering it not suspended or released, except that no child shall be sent or taken out of the County or be detained in an institution without the County while such appeal is pending. Appeals under this section shall take precedence over all other business of the Court to which an appeal is taken. The Circuit Court shall try such appeal, de novo, and defendants shall have a right, in the discretion of the Judge of said Circuit Court, to trial by jury, if demanded in writing by him as required in other misdemeanor cases in a Circuit Court. The Circuit Court shall have the power to render such judgment as said Juvenile Court should have rendered under this Act or remand the case with instructions. It shall cause its judgments to be certified down to the said Juvenile Court which shall make such judgments its own, and enter such further orders from time to time as are proper to carry it out. If the Circuit Court does not dismiss the case, or does not discharge the child from custody it shall remand the child to the jurisdiction of the Juvenile Court for its supervision and its care, but if it dismisses the appeal the Juvenile shall remain under the jurisdiction of said Juvenile Court as if it had rendered such certified judgment in the first instance, or as if an appeal had not been taken."

Section 18, supra, provides for an appeal to the Circuit Court of Mobile County, Alabama, after the rendition of a final decree in the Juvenile Court against a child, and makes provision that such an appeal must be tried de novo with the discretionary power placed in the judge of the Circuit Court to grant a trial by jury if demanded in writing as required in other misdemeanor cases. However, Section 18, supra, and the other sections of the Act pertaining to the Juvenile Court of Mobile County, Alabama, are silent as to the question propounded by you, that is, where is an appeal from a final decree in said court adjudging a child a juvenile delinquent docketed upon reaching the Circuit Court of said County? — Is it placed upon the equity, civil or criminal docket?

In answering this question, I first call attention to Section 12 of Act No. 571, supra, which tends to show the purpose and intention of the Legislature in creating the Juvenile Court of Mobile County, Alabama. The pertinent part of said section is as follows:

"Section 12. Ward of the State, not a criminal; adjudication not disqualification. Style of proceedings, construction, confessions. All proceedings against Juvenile under this Act shall be on the theory that the child is a ward of the State, and not a criminal, but rather as misdirected and in need of assistance, kindness and firmness of control and direction of his ways. And it shall not be treated or deemed a criminal. The child shall not be denominated a criminal by virtue of any adjudications under this Act, nor shall any adjudication ever be denominated a criminal by virtue of any adjudications under this Act, nor shall

any adjudications ever be denominated a conviction of a child. The child shall not be a convict hereunder. Adjudication under this Act shall not operate to disqualify the Juvenile, nor to disqualify after attaining majority from holding any office, place or position under any State or municipal or other Civil Service."

In the case of *Hymes v. State*, 209 Ala. 91, 95 So. 383, the Supreme Court of Alabama in considering the appeal of an appellant who had been adjudicated a juvenile delinquent, made the following statement in construing Section 11 of the Act under which the Juvenile Court of Jefferson County was created—Act No. 146, S. 68, approved February 19, 1919 (General Acts, 1919, page 128) as amended, and which section is similar to the quoted part of Section 12, *supra*:

"The defendant cannot in this proceeding, be convicted of the criminal offense alleged in the petition. It is not a criminal proceeding against him. The statute is for the benefit of the unfortunate child, as well as for the public good. The state by the act places its care and protection around him, takes the custody, control and discipline of him, does not seek to declare or treat him as a criminal, but makes him its ward and thereby protects society, and looks after the welfare of the child. Such a statute and the proceedings under it are *sui generis*. They are neither civil nor criminal, yet they partake of the nature of both, and hence should be styled quasi criminal." (Emphasis supplied)

From the above quoted excerpt, it will be seen that proceedings against a delinquent juvenile are not strictly criminal in nature but should be styled as quasi criminal.

Attention is next called to the fact that the probate courts of the several counties of the State, except in those counties where special courts have been established, are given jurisdiction over delinquent juveniles and exercise the powers, duties and functions provided for by Sections 3528 through 3559, both inclusive, of the Code of Alabama, 1923, as amended by Act No. 315, H. 744, approved June 29, 1931 (General Acts, 1931, page 353). A review of these sections discloses that whenever a child is adjudged a juvenile delinquent by a probate court acting as a juvenile court, the child has a right of appeal. This right is provided for in Section 3538 of the Code, *supra*, the pertinent part, for the purpose of this opinion, being as follows:

"3538. Appeals.—Any party aggrieved may take an appeal from any judgment or order of the court arising under the provisions of this chapter to the Circuit Court of the County sitting as a court of equity * * *." (Emphasis supplied)

The above section governs appeals by juvenile delinquents, and it will be seen that upon such an appeal the case goes to the Circuit Court of the county, sitting as a court of equity, and, therefore, would be placed upon the equity docket. Also a study of the special act creating the Juvenile Court of Jefferson County, *supra*, and the special act creating the Juvenile Court of Montgomery County, Act No. 70, H. 188, approved February 26, 1931 (General Acts, 1931, page 132) as amended, discloses that in each of said acts provision is made that, upon appeal by a child who has been adjudged a juvenile delinquent, the case goes to any court within the respective county having equity jurisdiction.

Attention is last called to the following provision found in Section 18, *supra*:

"The Circuit Court shall try such appeal, de novo, and defendants shall have a right, in the discretion of the Judge of said Circuit Court, to trial by jury, if demanded in writing by him as required in other misdemeanor cases in a Circuit Court." (Emphasis supplied)

It will be noted that the above provision gives the child, on appeal to the Circuit Court of Mobile County from a decree of the Juvenile Court of said county adjudging him a juvenile delinquent, the right, in the discretion of the judge of the Circuit Court, to a trial by jury if demanded in writing as required in other misdemeanor cases. The wording of the above provision at first reading leaves the impression that such an appeal is in the nature of a criminal case, but in my opinion, this is not true. Under the express provisions of Section 8598 of the Code of Alabama, 1923, the right to a jury trial in the Circuit Court is guaranteed in all misdemeanor cases if properly and seasonably demanded in writing by defendant as required by law, and is not left to the discretion of the judge. It therefore seems that the provision as to a jury trial in Section 18, *supra*, was so worded for the sole purpose of showing the procedure to be followed in demanding a jury trial and not for the purpose of guaranteeing the same. Such discretion as here placed in the Circuit Court in regard to the granting to a defendant a trial by jury when properly demanded can be found only in the chancery court. *Code of Alabama, 1923, Section 6631; Alabama-Tennessee & Northern Ry. Co. v. Aliceville Lumber Co., et al., 199 Ala. 391, 74 So. 441; Wilbourne et al v. Mann et al., 203 Ala. 26, 81 So. 816; Hill v. Lindsey, 223 Ala. 550, 137 So. 395.*

It is, therefore, my opinion that the only logical conclusion that can be reached from the foregoing reasoning, and the authorities cited in support thereof, is that wherever a child is adjudged a juvenile delinquent by the Juvenile Court of Mobile County, and appeals, the case goes to the Circuit Court of the said county, sitting as a court of equity, and is placed upon the equity docket.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 17, 1940.

Hon. Sim L. Howell,
Chairman, Board of Revenue and Control,
Morgan County,
Decatur, Alabama.

Special elections — Notice—

Sheriff authorized to publish notice of special election called by the Governor only once.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 3, 1940 in which you request my opinion as follows:

"Upon the resignation of Rutledge S. Thomas representative in the legislature from Morgan County, the Governor ordered a special election to fill the vacancy and directed the sheriff to give thirty day notice of the holding of the election. The sheriff published a notice in the Decatur Daily for four weeks and upon the bill being presented to the county it was audited and allowed by the board.

"The auditor has just completed an audit of the books of the county and has charged this item back to the chairman, stating that the publication should have been made for only one week.

"It occurs to us that the sections of the Code providing for the calling of a special election (529 et seq.) do not designate the time or the number of publications and that section 447 governs. Therefore it would seem that the thirty days notice provided for in Section 447 would be construed with the provisions contained in the last sentence of section 9260 which provides that where thirty days is specified four weeks shall be the equivalent of thirty days. This seems to be intimated in the case of Richter v. State, 156 Ala. 127, 47 So. 163."

In my opinion, the auditors were correct in concluding that the publication of the notice of the special election ordered by the Governor to fill the vacancy occasioned by the resignation of Hon. Rutledge S. Thomas, representative in the legislature from Morgan County, should have been made only once.

Article 20 of the Code of Alabama, 1923, relates to special elections (Code of Alabama, 1923, Sections 529-535). Section 533 of Article 20, supra, provides that the sheriff is to give notice of special elections in his county, as follows:

"Section 533. Sheriff to give notice of elections in his county. — Whenever the sheriff of any county receives a writ of election directing a special election to be held, or receives notice of a special election for representatives in congress, or for any state or county officers, such sheriff must immediately give notice by proclamation of the time, place, and object of such election **as provided by law.**" (Emphasis supplied)

You will note that the notice is required to be given "as provided by law." This immediately presents the question of the "law" which is to govern. The clue to this question is found in Section 535 which provides that:

"Special elections are to be held and conducted, the returns thereof made, and certificates given, and, unless otherwise expressly provided, regulated in all respects by the provisions in relation to general elections."

It would appear, therefore, that it is necessary to refer to the notice required to be given in general elections in order to ascertain the number of times notice of special elections should be given.

Section 447 of the Code of Alabama, 1923, provides for the notice to be given by the sheriff of general elections as follows:

"Section 447. Notice by sheriff of election.—The sheriff must give notice at least thirty days before each election, by publication in some newspaper in the county, if any is published therein, and if not, by writings posted at the courthouse door and at three other places in the county, of the time of holding and the offices to be filled by such election. Such notice shall consist only of the date of the election and the officers to be voted for or subjects to be voted on."

You will note that the requirement is that the sheriff must give notice "at least thirty days before each election." The requirement is not that "thirty days' notice of the election" be given. It will thus be seen that all that is necessary under Section 447 is that a single notice by publication in some newspaper in the county, if any is published therein, be given—Section 447 requiring that such notice be given not less than thirty days before the election. Cf. *Biennial Report of Attorney General, 1918-20, page 198.*

Section 9260 to which you refer in your letter of inquiry applies only "when the notice is required to be given for a specified number of weeks" or days. It has no application here for the reason that notice is not required to be given for a specified number of weeks or days—the requirement being only that it must be given "at least thirty days before each election."

In my opinion, the case of *Richter v. State*, 156 Ala. 127, 47 So. 163, to which you refer, does not appear to be exactly in point. You will note that the statute there considered required thirty days' notice by advertisement in a newspaper etc., and not "notice at least thirty days before each election."

You are advised, therefore, that since Section 447 requires and authorizes only a single notice and since Section 533 must be read in *pari materia* with this section, it is my opinion that the sheriff was without authority in publishing notice more than a single time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Dr. L. N. Duncan, President,
Alabama Polytechnic Institute,
Auburn, Alabama.

Alabama Polytechnic Institute—Retirement of Teachers—

Retirement of the teachers of Alabama Polytechnic Institute discussed generally.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion of July 15, 1940, which follows:

"The Congress of the United States recently enacted a law concerning the use of federal funds for retirement of people paid in whole or in part from federal funds in the several states and territories in federal and cooperative work. (Public—No. 422—76th Congress. Chapter 38—3d Session, S. 1850). The Alabama Legislature approved an act (No. 419 S. 362 Young—Norman. Bullock) concerning retirement or the use of funds for retirement of teachers, etc.

"In your judgment do these acts provide adequate legal authority for the Alabama Polytechnic Institute to set aside and expend a certain portion of our state and federal funds for the purposes named, provided the plan for doing this is approved in advance by the Board of Trustees of this institution?

"If sufficient legal authority does not now exist, what additional legislation is needed?

"Other state laws may pertain to this same subject but we are merely citing those with which we are familiar."

The act passed by the Legislature of this State referred to in your request is Act No. 419, S. 362, approved September 15, 1939, General Acts, 1939, page 559. This act sets up and creates a retirement system for the teachers of the public schools of this State, and all educational institutions supported by and under the control of the State.

The membership of the retirement system created by this act is set out in Section 3 thereof, which reads in pertinent part as follows:

"Section 3. MEMBERSHIP. The membership of the retirement system shall consist of the following: (1) All persons who shall become teachers after the date of establishment shall become members of the retirement system as a condition of their employment. (2) Any person who is a teacher on the date of establishment shall become a member as of that date unless within a period of ninety days next following such teacher shall file with the Board of Control on a form prescribed by the

Board a notice of his election not to be covered in the membership of the system and a duly executed waiver of all present and prospective benefits which would otherwise inure to him on account of his participation in the retirement system."

It will be noted from subsection (1) quoted above that all persons who shall become teachers after the establishment of the retirement system, shall become members of such system as a condition of their employment.

It will be noted from subsection (2) quoted above that all persons who are teachers as of the date of the establishment of the retirement system shall become members thereof, unless they elect not to become members within ninety days after the establishment date. For your information, the establishment date for the retirement system is set out in Section 2 of the act under consideration.

In so far as teachers employed by your institution subsequent to the establishment date of the retirement system, it is mandatory that such teachers become members of the retirement system. As pointed out above, membership in the retirement system is made a condition of employment of teachers coming within this category. As to teachers employed by your institution as of the establishment date of the retirement system, membership in the retirement system is not mandatory; that is to say, such teachers may elect not to accept the provisions of the retirement system by filing a declaration with the Board of Control within ninety days after the establishment thereof.

The method of financing the retirement system is set out in Section 8 of the act under consideration. The three funds to which the employers are required to contribute are (1) the Pension Accumulation Fund, (2) the Pension Fund and (3) the Expense Fund. These funds are set up by subsections (3), (5) and (6), respectively, of Section 8 of this act.

Subhead (c) of subsection 7 of Section 8 of this act reads in pertinent part as follows:

"(c) The collection of employers' contributions shall be made as follows: On or before October first of each year, upon the basis of the last actuarial valuation, the Board of Control shall prepare and certify to the State Comptroller a statement of the amount calculated as a percentage of the salaries of teachers to be contributed by employers in the ensuing year to the Pension Accumulation Fund, the Pension Fund, and the Expense Fund in accordance with Subsections (3), (5) and (6) of this section. Thereupon the State Comptroller shall set this amount up annually in the state budget as the amount to be transferred from the teachers' retirement fund to the custody of the Board of Control of the Teachers Retirement System. On or before the first of November of each year, the State Comptroller shall certify to the Secretary-Treasurer of the Board of Control the amount in the teachers' retirement fund available for such transfer and, after making a record of such certificate, the Secretary-Treasurer shall draw a warrant payable from the teachers' retirement fund in the amount required to pay the contributions of employers in the ensuing year to the Pension Accumulation Fund, the Pension Fund, and the Expense Fund in accordance with Subsection (3), (5) and (6) of this section, or, in the total amount certified

by the State Comptroller as available in the teachers' retirement fund if such total is less than the amount required to pay the contributions of employers as named above, and shall transmit the same to the State Treasurer to be held for use according to provisions of this act.

* * * * *

"Provided, however, that any provisions of this act to the contrary notwithstanding, the contributions provided to be made by any of said employers to the Pension Accumulation Fund, the Pension Fund, and the Expense Fund, shall be payable only out of said teachers' retirement fund in the manner herein provided, and said employers, other than the State of Alabama, shall not in any event be called upon to pay any such contribution from any appropriations or other moneys or funds of such employers." (Emphasis supplied)

The Teachers' Retirement Fund referred to in the above quotation is that fund established by Act No. 518, H. 494, approved September 21, 1939, General Acts, 1939, page 807.

You are therefore advised, in view of the above, in my opinion your institution is not authorized to contribute any funds appropriated to it by the State to the retirement system established by the act under consideration.

You called my attention to an Act of Congress entitled "An Act to aid the states and territories in making provisions for the retirement of employees in land-grant colleges." This act authorizes land-grant colleges to contribute federal funds to retirement systems set up by the various states and territories, provided such contributions are credited to those teachers who are paid in whole or in part from such federal funds.

Of course, the State of Alabama could not pass a statute which would prohibit such land-grant colleges from contributing federal funds to the retirement system established by Act No. 419, supra. However, I see no necessity for such institutions contributing any federal funds to this retirement system, as adequate provision is made for the employers' contribution to be made out of the Teachers' Retirement Fund.

As to the members of your faculty who elected not to avail themselves of the provisions of Act No. 419, supra, you are advised that the following retirement system may be established for those members of your faculty.

This office, in an opinion rendered to Hon. John A. Rogers, Member, Board of Trustees, Alabama Polytechnic Institute, under date of July 11, 1928, which opinion appears on page 655 of the Biennial Report of the Attorney General, 1926-28, held that a group insurance policy could be taken out on the lives of the professors, for the benefit of the estates of such professors, and the premiums on such policies could be paid out of the funds of the institution.

This opinion was followed in a letter to Dr. Richard C. Foster, President of the University of Alabama, under date of February 2, 1938, wherein Dr. Foster was advised that the University of Alabama might participate in a

program of group insurance on the lives of the members of its faculty, and pay the premium on such policies.

In the Rogers opinion and in the letter to Dr. Foster, the type of insurance considered was ordinary life insurance. However, it seems to me that it logically follows, that, if the Alabama Polytechnic Institute and the University of Alabama can pay the premiums on ordinary life insurance policies on the lives of the members of their faculty, they could likewise take out annuity policies for the benefit of the members of their faculty, and pay the premiums thereon.

In light of the above, if the Board of Trustees of your institution deemed it more economical and advantageous to set up its own annuity fund rather than pay premiums to insurance companies on annuity policies, I know of no law that would prohibit such a plan.

You are therefore advised that in my opinion your institution may set up an annuity fund for the benefit of its professors, and may set aside and contribute State funds of the institution to such annuity fund, and under the authority of the Act of Congress mentioned hereinabove, may also set aside and contribute federal funds to such annuity fund.

Your attention is called to the fact, however, that federal funds may only be contributed and credited to the account of those professors who are paid in whole or in part from federal funds and also meet the other requirements of the Act of Congress.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Hon. H. W. Clayton, Clerk,
Circuit Court, Marshall County,
Guntersville, Alabama.

Elections — Primaries — Code of 1923, Sections 3937, 3938, 3950,
3954 — General Acts, 1931, page 73 — General Acts, 1923, page 195.

A candidate is prohibited from electioneering or soliciting votes on election day. A candidate is prohibited from assisting an elector in marking his or her ballot.

A candidate soliciting votes on election day is subject to prosecution for violating the corrupt practice act. A candidate soliciting votes on election day does not of and in itself disqualify said candidate from the office he is seeking. A candidate assisting an elector in the preparation of his ballot does not of and in itself disqualify him for the office he is seeking.

The chairman of the Democratic Executive Committee should make a list of the names of absent voters, as the envelopes containing ballots are received showing the date and hour of the receipt thereof by him, and on the day of election should be delivered over to the election officers of the absentee ballot box.

The chairman of the County Executive Committee must comply with Sections 678 and 683 of the Code of 1923, as modified by Acts, 1933, page 195, and is subject to prosecution for a wilful failure or refusal to perform or discharge any duty required of him under said sections.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of June 29, 1940, in which you request my opinion as follows:

"Please give me an opinion on the following at your earliest convenience:

"1. In a second primary or run-off has a candidate for any county office the authority to solicit any votes on the day of the election or haul any one to the voting place (in his own precinct or any other precinct) and go into the building and mark the elector's ballot in his own behalf then ask the elector whom he wishes to vote for any other office on the same ticket?

"2. In case this happened would this disqualify the candidate for the office he is seeking, or just what would be the punishment for so doing?

"3. When the Chairman of the Democratic Committee in a primary receives the absentee ballots, should he make a list of the names, the date and hour of each ballot received from the Post Office, and turn this list over to the Probate Judge?

"4. If the Chairman is supposed to keep this list and fails to comply with the law, just what would be the penalty for failing to do his duty?"

I call your attention to Subsection 4 of Section 599 of the Code of Alabama, 1923, which provides in pertinent part as follows:

"It is a corrupt practice for any person on election day * * * (4) to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

I call your attention to Section 22 of Act No. 56, House Bill 73, approved February 25, 1931, commonly referred to as the Primary Act of 1931, which provides:

"Section 22. That if a qualified elector is unable to read or is so physically disabled that he cannot make his cross mark on a ballot, and request assistance in preparing his ballot, the inspector shall swear him as to such disability, and thereupon no more nor less than two inspectors shall assist such voter by one of them in the presence of the other inspector, marking his ballot as he directs. Each elector in preparing his ballot shall prepare the same in the room or place where such election is being held, and not elsewhere."

Section 3937 of the Code of Alabama, 1923, provides:

"Corrupt practice in election or primary election.—Any person or persons who do any act defined or declared to be a corrupt practice under the election or primary election laws of this state, or who wilfully fails or refuses to do any act required of such persons under article 26 of chapter 19 of this Code, relating to the corrupt practice law of this state, shall be guilty of a misdemeanor, and, on conviction, must be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case."

Section 3950 of the Code of Alabama, 1923, provides:

"Section 3950. Assisting voter to prepare ballot.—Any person who assists a voter in preparing his ballot to be voted at a primary election, except as he is authorized to assist such voter under the primary election laws of this state, shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars, nor more than one thousand dollars."

Section 358 of the Primary Act of 1931 provides:

"Section 358. Violations of primary election laws. — Any person who violates any of the provisions of the primary election laws of this state, for which a penalty is not herein otherwise provided, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty dollars and not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court."

It will be observed from a reading of the foregoing sections that a candidate is prohibited from soliciting any votes on election day and that a candidate is not permitted by law to assist an elector in marking his or her ballot. A candidate for office soliciting votes on election day is subject to prosecution under Section 3937 of the Code of Alabama, 1923. A candidate assisting a voter in the preparation of his ballot on election day is subject to prosecution under Section 3950 of the Code of Alabama.

The Supreme Court of Alabama in the case of *Doughty v. Bryant*, 226 Ala. 23, 145 So. 420, in construing Section 587 and 588 of the Corrupt Practice Act held that the statutes were highly penal and must be strictly construed. Bearing this in mind, I am of the opinion that a candidate soliciting votes on election day does not of and in itself disqualify said candidate from the office he is seeking, and that a candidate assisting a voter in the preparation

of his ballot on election day does not of any in itself disqualify said candidate from the office he is seeking.

Section 678 of Article 3, Chapter 20, Code of Alabama, 1923, provides:

"How vote cast.—The absent voter so entitled to vote, provided at the time he requests such ballot his name is on the official list of qualified electors in such county, may procure from the judge of probate of the county of his residence, an official ballot of the party with which such voter is affiliated, or with which he desires to affiliate in such election, and such voter shall make and subscribe the oath or affidavit hereinafter set out, and attach the same to his ballot, and forward the said ballot and affidavit in a sealed envelope by mail, postage prepaid or otherwise, to the chairman of the county executive committee of the political party with which such voter is affiliated, or other authority as provided in sections 679 and 680. **The chairman of the county executive committee, or other authority as provided, shall endorse on said envelope over his signature the date and hour of the receipt thereof by him, and shall safely keep the said ballot without breaking the seal thereof, and deliver the same on election day to the officers of election at the voting place of said absent voter, when and where said election officers shall open said envelope, and in the event the name of such absentee voter appears on the official list of qualified voters for said county and for said precinct or district, shall check his name off of such official voting list and cause the said ballot to be duly and properly recorded, subject, however, to challenge as in other cases provided for. The same shall be handled in all respects as if the said absentee voter were present and voting in person.**" (Emphasis supplied)

Section 683 of the Code of 1923 provides:

"Section 683. Lists of absent voters kept by probate judge.—The probate judge of each county in which application is made for a ballot as provided for herein, shall make, as applications are filed for ballots under this article, and keep for sixty days after the date of election, a full list showing names, residences and polling places of such as apply for said ballots, which list shall be open to inspection to the public at all times. The chairman or other authority, as provided for by sections 679 and 680 hereof, who may have upon him the duty of receiving and delivering said ballots to the respective polling places, shall make, as the envelopes containing ballots are received, a list showing the dates when received and the names of the absent voters, with their respective precincts in which they are respectively qualified to vote. The said list shall be open to inspection by the public at all times. **The chairman or other authority, as provided by sections 679 and 680 who may have upon him the duty of delivering said ballots to the respective polling places, shall make, as the envelopes containing ballots are received, a list showing the dates when received and the name of absent voters, with their respective precincts in which they are respectively qualified to vote. Said list shall be open to inspection at all time and on the day of election shall be delivered by the authority making same to the probate judge of the county in which said authority's duties hereunder are performed. The two lists in this section provided for shall be preserved by the respective probate judges for sixty days after the election, just prior to which same are made.**" (Emphasis supplied)

Section 6 of Act No. 178, Senate Bill 27, approved April 19, 1933, General Acts, Extra Session, 1933, page 193, modifies Sections 678 and 679, *supra*, and provides:

"Section 6. On the date of any general, special, or municipal election, as soon as the polls are open, the Judge of Probate, or person acting in his stead in the case of general or special elections, or the chairman of the political party holding the primary, or person acting in his stead in the case of primaries, or the mayor or other chief executive officer or person acting in his stead in the case of municipal elections, shall deliver all absentee ballots received to the election officers appointed under Section 5 of this Act. Provided, that in municipal elections in cities and towns of less than 10,000 inhabitants, such ballots shall be delivered to the election officers of the precincts of the respective voters, as now provided by law. The said Judge of Probate, Chairman of the executive committee of a political party holding a primary, Mayor, or other chief executive officer, (except in cities and towns of less than 10,000 inhabitants) shall, on the date of the election, deliver to the election officers of each polling place of the county or city, a list showing the names and addresses of each and every person whose name appears on the official voters list in such polling place or precinct, who voted an absentee ballot." (Emphasis supplied)

Section 3938 of the Code of Alabama, 1923, provides:

"Section 3938. Wilfully refusing to perform duties as to absent voters.—Any person who shall wilfully fail or refuse to perform or discharge any duty required of him in article 4 of chapter 19 and article 3 of chapter 20 of this Code, relating to absent voters, shall be guilty of a misdemeanor, and, on conviction, shall be fined not more than one hundred dollars."

The foregoing statutes clearly show that it is the duty of the chairman of the County Democratic Executive Committee to make a list showing the dates when received and the names of the absent voters, and it is his duty to endorse his signature on the envelopes received by him and the date and hour said ballot was received. It is also his duty to deliver said list on election day to the election officials of the absentee ballot box. See opinion to Hon. Frank M. Dixon, Governor, dated May 3, 1940. Any person who fails or refuses to perform or discharge any duty required of him relative to absent voters is subject to prosecution under Section 3938 of the Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Hon. John C. Curry,
Commissioners of Revenue,
Capitol.

Tax sales—Statutory right of redemption—Executions—

The statutory right of redemption from tax sales is not subject to levy or sale under execution.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter requesting an official opinion, bearing date of July 5, 1940, is as follows:

"Re: Allen-Shirley Corporation.

"Allen-Shirley Corporation, a foreign corporation, is qualified to do business in the State of Alabama and has been for the last several years. The corporation has filed returns for the years 1936, 1937, 1938 and 1939 for foreign corporation franchise tax. Based upon these returns assessments have been made against this corporation, from which assessments no appeals have been taken, and the same have now become final in accordance with the provisions of Section 327 of the Revenue Act of 1935. This corporation has a great deal of real estate returned by it to the tax assessor of Colbert County for purposes of ad valorem taxation in Colbert County, Alabama. Therefore, a writ of execution has been issued to the sheriff of Colbert County in accordance with Section 327 of the Revenue Act of 1935 for the collection of the franchise tax for the years 1936 through 1939.

"We have now been informed that all of the real estate belonging to this corporation was sold for ad valorem taxes for the year 1939 on June 16, 1940. Thus the corporation has only a right to redeem this real estate from the tax sale. No other assets are available in Colbert County or in the State of Alabama so far as we know which are subject to levy and sale. The sheriff of Colbert County has inquired of us as to whether he can levy on and sell this right to redeem.

"Will you kindly give us your opinion at your earliest convenience as to whether the sheriff may levy upon the right of redemption of this corporation to the real estate which has been sold to the State, in order that we may properly advise the sheriff."

My answer to your inquiry is in the negative.

In the case of **Whiteman v. Taber**, 203 Ala. 496, 83 So. 295, the following statement is found:

"The nature of the right or privilege of statutory redemption has often been defined, as we have uniformly decided that it is merely a personal privilege, is neither property nor the right of property, is not subject to levy or sale as such under execution, and, as stated, is merely

a right or privilege of the debtor. *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 46, 62; *Childress v. Monette*, 54 Ala. 317; *Mewburn v. Bass*, 82 Ala. 622, 626, 2 South. 520; *Cooper v. Hornsby*, 71 Ala. 62; *Seals v. Pfeiffer*, 77 Ala. 278. Such was the uniform holding of this court before the more recent amendments to the statute making this personal privilege assignable and descendable after the equity of redemption had been cut off by a regular or effective foreclosure, and extending the classes by which the personal right or privilege may be exercised. *Baker, Lyons & Co. v. Eliasburg & Bros. Mer. Co.*, 79 South. 13; *Dinkins v. Latham* 79 South. 493; *Whittmeir v. Crantford*, 199 Ala. 1, 73 South. 981; *Powers v. Andrews*, 84 Ala. 289, 291, 4 South. 263."

The above rule has been many times re-enunciated by our Supreme Court, the last case I find on this subject being the case of *Federal Land Bank of New Orleans v. Ozark City Bank*, 225 Ala. 52, 142 So. 405.

It is true that the statutory right of redemption referred to in the above quotation from the *Whiteman* case is a statutory redemption from a mortgage foreclosure sale.

Those persons who are permitted to redeem from a mortgage foreclosure sale are set out in Section 10140 of the Code of 1923, which reads as follows:

"Section 10140. Redemption by debtor et als.—Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in manner following."

Those persons who may redeem from a tax sale are set out in Section 268 of the Revenue Act of 1935, which reads in pertinent part as follows:

"Section 268. Real estate which hereafter may be sold for taxes and purchased by the State may be redeemed at any time before the title passes out of the State, or if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his heirs or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor, or other creditor having a lien thereon, or on any part thereof; * * *."

It will be noted that the class of persons who may redeem from a mortgage foreclosure sale and the class of persons who may redeem from a tax sale are very similar in nature. That is to say, the statutory right of redemption from a mortgage sale, is a personal right or privilege, and is neither property nor a property right.

You are, therefore, advised that in my opinion the statutory right of redemption from a tax sale is not subject to levy or sale under execution, and

such statutory right may only be exercised by those persons enumerated in Section 268 of the Revenue Act of 1935.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Hon. Sam C. Cook,
Treasurer, Colbert County,
Tuscumbia, Alabama.

Counties—Loan to pay interest on bonds—

County may not borrow money for payment of interest on bonds issued for road and bridge purposes and issue warrants, secured by the general fund, to repay same; but may negotiate such loan and issue interest bearing warrants by pledging (1) the special road and bridge tax levied and collected under Section 215 of the Constitution, not otherwise encumbered, or (2) not exceeding one-third of its share of state-levied gasoline tax.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 13, 1940, in which you request my opinion as follows:

"Colbert County owes the semi-annual interest due on bonds issued July 1, 1921 to provide funds to construct public roads in the county.

"Funds are not available in the County treasury to pay this interest at this time and it is necessary for the County to secure a loan for this purpose.

"The plan of the County is to pay the proposed loan during the fiscal year beginning October 1, 1940 and ending September 30, 1941.

"The County has not during the time the County financial control act of 1935 has been in force had outstanding any temporary loans as provided by Section 11 of said Act.

"Question 1.

"Now in view of Section 12 of the County financial control Act of 1935 and the fact that this proposed loan is to pay interest on outstanding road bonds issued in 1921, can the County legally borrow this money as a temporary loan and issue interest bearing warrants payable out of the General Fund?

"Question 2.

"Can the County legally borrow this money for this purpose and issue interest bearing warrants and pledge as security the special Road and Bridge tax levied and collected under Section 215 of the constitution? In this connection please also advise whether the County financial Act is applicable to this special tax levied under Section 215 of the Constitution.

"Question 3.

"Can the County legally borrow money for this purpose and pledge or assign as security the County's anticipated Gasoline tax allotted by the State to the County? In this connection please also advise whether the Act of 1936 Legislature, Page 28 authorizing the expenditure of one third of the County's share of the Gasoline tax to read debts is still in force and effect or whether this Act has been repealed or modified or limited by Act No. 157 of the Legislature of 1937, Page 179 or by Act No. 510 of the Legislature of 1939, Page 792 or by any other Act.

"It is very important that the County arrange to pay this interest without delay. Please kindly give us your ruling upon these questions as soon as possible."

In my opinion, your first inquiry should be answered in the negative.

I find no authority for the county to legally borrow money as a temporary loan for the payment of interest on bonds originally issued to provide funds to construct public roads in the county, and to issue interest bearing warrants payable out of the general fund to repay this loan. This office has several times held that the county is without authority to borrow money from the general fund for similar purposes or to transfer money from the general fund to the road and bridge fund or the gasoline tax fund except in those cases where a surplus exists in the general fund, which fact evidently does not prevail in this instance. See **Biennial Report of Attorney General, 1936-38**, page 472; **Quarterly Report of Attorney General, Vol. XVIII**, page 71.

In view of these rulings, it logically follows that interest bearing warrants payable out of the general fund of the county, issued for the purpose of paying interest on road and bridge bonds as detailed in your letter of inquiry, would be illegal.

Answering your second inquiry, you are advised that the county may legally borrow the money in question and issue interest bearing warrants therefor, pledging as security the special road and bridge tax levied and collected under Section 215 of the Constitution provided the same was voted for such purpose and is not otherwise encumbered. A similar conclusion was reached in an opinion rendered under date of July 22, 1936, to Hon. J. Percy Oliver, Judge of Probate, Tallapoosa County, Dadeville, Alabama, **Quarterly Report of Attorney General, Vol. IV**, page 73.

In an opinion rendered to Hon. S. P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of April 1, 1937, **Quarterly Report of Attorney General, Vol. VII**, page 8, it was held that the County Financial Control Act (Act No. 379, H. 191, approved September 9, 1935, General Acts,

1935, page 803) is not applicable to revenues derived from the proceeds of a tax levied under Section 215 of the Constitution of 1901, such act being applicable only to the general fund of the county. See also *Isbell v. Shelby Co.*, 235 Ala. 571, 575, 180 So. 567.

Answering your third inquiry, you are advised that the county, to meet this interest payment, may issue interest bearing warrants, not general obligations of the county, payable from not exceeding one-third of its share of state-levied gasoline tax. In this connection, I call your attention to an opinion rendered under date of February 1, 1939, to Hon. J. C. Grady, Judge of Probate, Chambers County, Lafayette, Alabama, Quarterly Report of Attorney General, Vol. XIV, page 89, I am enclosing copy of opinion rendered under date of July 12, 1940, to Hon. W. L. Pratt, Judge of Probate, Bibb County, Centreville, Alabama, in which the decisions of the Supreme Court of this State relative to this question are collated. Your attention is directed particularly to the case of *Isbell v. Shelby County*, 255 Ala. 571, 180 So. 567, cited therein, which case, with the citations therein, is further authority for the conclusion reached above.

In the *Isbell* case the Court had this to say concerning Act No. 157, S. 83, approved March 4, 1937 (General Acts, 1936-1937, page 179), the effect of which act is made the subject of your inquiry:

"Nor are we able to see any restriction upon this authority, (the authority to issue bonds, securities, orders, or other legal commitments against the gasoline tax allotments) by any provision of the Act approved March 4, 1937, Gen. Acts, 1936-37, Ex. Sess. p. 179, which merely reiterate the purposes for which these funds are to be used, with some clarification as to detail matter intended to be included within such purpose."

The above quotation is equally applicable to that portion of Act No. 510, H. 782, approved September 19, 1939 (General Acts, 1939, p. 792) which restricts the use of the particular portion of the gasoline tax accruing to the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Hon. Leonard Johnston,
Member, Board of Education,
Elmore County,
Wetumpka, Alabama.

Schools—County Board of Education—Contracts—

County board of education may not make contracts of employment with school bus drivers binding successors in office.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 1, 1940, in which you request my opinion as follows:

"I am a member of the County Board of Education in Elmore County. On June 28, 1940, the Board of Education met in the County Superintendent office and on the recommendation of the County Superintendent gave every bus driver in Elmore County a four (4) year contract.

"These bus drivers have been driving on nine and eleven cent mileage basis using their own buses without contracts. Some drivers has (sic) had sixteen years of experience and have been very friendly toward this administration.

"In Jan. 1941 a new administration will go into power in Elmore County, however some of the same Board Members will remain on the board during the new administration. The present Superintendent thought it would be wise to leave the experienced bus drivers in care of the children through a new administration.

"Will these contracts hold for the four years to come? Any information will be greatly appreciated."

In reply, I wish to advise that in my opinion your question must be answered in the negative.

The general power of the county board of education to contract may not be successfully challenged. Our Supreme Court has, in the cases of **State v. Tuscaloosa County**, 233 Ala. 611, 172 So. 892, and **Kimmons v. Jefferson County Board of Education**, 204 Ala. 384, 85 So. 774, definitely upheld the authority of the county board of education to enter into valid and binding contracts.

The question of whether or not these contracts may by their terms bind the members of a succeeding county board of education must, however, necessarily involve more than the general authority of the said county board of education to contract.

The nature of the particular contract here considered involves the exercise of both judgment and discretion upon circumstances which may be changed in character at a later time as compared to their characteristics at the time of the inception of the contract.

I wish to call your attention to 56 Corpus Juris, Section 514, page 485, which states as follows:

"Power to Bind Successors. Although it has been said that a public school board or officers cannot enter into a school contract so as to limit the discretion of their successors, contracts which were valid when made are binding on the successors of the board or officers making them, except where the contract is not for a necessary matter, or is for an un-

reasonable length of time, or where fraud attaches. Where district officers are permitted to hold office until their successors are elected and qualified, such officers may bind the district by a lease of a building for a school, even though the lease was entered into subsequent to the election of their successors but prior to qualification by such successors. A valid lease may be made which extends beyond the term of office of the members of the board executing it, but where the board is given discretion by statute to determine the particular classes to be taught, a contract to maintain a particular class in the building for a period beyond the term of office of the members executing it is voidable by their successors."

The employment of employees of the county board of education is provided for by Section 161 of the School Code of 1927, which provides as follows:

"Employees Nominated and Transferred by Superintendent.—The County Superintendent of Education shall nominate in writing for appointment by the County Board of Education, all principals, teachers, and all other regular employees of the Board. He shall assign them to their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause, and recommend them for dismissal."

You will note that the above quoted provisions of law provide for nomination by the county superintendent of education and appointment by the county board of education as proper requirements for employment.

The Court of Appeals of Alabama in an opinion, later affirmed by the Supreme Court, held in the case of **Board of Education of Escambia County v. Watts**, 19 Ala. App. 7, 95 So. 498, 209 Ala. 115, 95 So. 502, that the employment of teachers must conform to the procedure set out in the above quoted provisions of law as reenacted in the School Code of 1927.

Employees of the county board of education must necessarily be governed by this decision of the courts since the same provisions of law control their employment.

An opinion of the Attorney General addressed to Hon. H. G. Dowling, County Superintendent of Education, Tuscaloosa County, under date of August 1, 1935, holds that teachers must be elected annually. The request in the named opinion and the instant request closely parallel, and it is to be noted that the same provisions of law for employment control. (I enclose a copy of the named opinion for your convenience.)

If the reasoning in the above named opinion be correct and we follow it here, then contracts of employment of employees of the county board of education are subject to be voided by the successors in office of the employing county superintendent of education and county board of education, as provided for by Section 161 of the School Code of 1927, quoted *supra*.

I wish to call your attention, however, to the fact that the law concerning employment of teachers has been changed. See Act No. 499, S. 759, approved September 21, 1939 (General Acts, 1939, page 759), and, of course, Section 161 of the School Code, *supra*, and the opinion of this office heretofore referred to, in so far as the same are applicable to contracts of employment of teachers, are no longer effective.

Premises considered, it is my opinion that the contracts of employment named by you would not be binding upon the successors in office of the present county board and the present county superintendent of education.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Motor Carriers—

Express companies engaging in motor vehicle operations are common carriers under the "Motor Carrier Act of 1939" (Act No. 669, H. 792, approved July 5, 1940, and effective ninety days subsequent to date of approval), and are subject to its provisions.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"On October 3, 1933, Hon. A. A. Carmichael, then Assistant Attorney General rendered an opinion to Hon. Hugh White, President of the Public Service Commission, which was not published, to the effect that motor truck transportation by the Railway Express Agency was not subject to regulation by the Public Service Commission under the provisions of the Motor Carrier Act of 1932 (Gen. Acts Ex. Sess. 1932, p. 178).

"We understand that since October 3, 1933, the Express Company has enlarged and extended its motor truck operations to include schedules over routes that have no rail connections.

"On December 27, 1939, the Interstate Commerce Commission ruled that the Railway Express Agency, Inc., was subject to the Federal Motor Carrier Act of 1935, for operation similar to those discussed in the opinion of the Hon. Carmichael above noted.

"We are attaching a copy of the decision rendered by the Interstate Commerce Commission to this letter.

"In the light of the decision by the Interstate Commerce Commission and in view of the definition of common carrier in the Motor Carrier

Act of 1931 as being transportation companies 'operating between fixed termini or over a regular route and who hold out to carry for hire so long as it has room for all persons alike,' with no exceptions, will you please reconsider the facts set out in the opinion of October 3rd, 1933, hereinabove referred to and give us your opinion as to the applicability of the Motor Carrier Acts to these operations by the Express Company."

I am informed that you wish your request confined to the "Motor Carrier Act of 1939", Act No. 669, H. 792, approved July 5, 1940, and effective ninety days following the date of approval by the Governor. Section 1 (f) of the above named act of the Legislature of 1939-40, provides as follows:

"F. The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or other arrangement, to transport passengers or property, or any class or classes of property for the general public in the State of Alabama by motor vehicle for compensation, whether over regular or irregular routes, or whether between fixed termini or not, including such other motor vehicle operations of carriers by rail or water and/or express and forwarding companies under this Act."

You will note that the specific provisions of the definition of "common carrier by motor vehicle" found in the above quoted provisions of law include motor vehicle operations of express companies. In your request you refer to an opinion of the Attorney General under date of October 3, 1933, which opinion was written construing the Motor Carrier Acts of 1931 and 1932 named by you in your request, in so far as the same might be applicable to motor transportation by express companies over routes which have no rail facilities.

You further cite the decision of the Interstate Commerce Commission of December 27, 1939, holding that motor vehicle operations of the Railway Express Agency, Inc., which operations are similar to operations in Alabama, as named by you in your request, are subject to the Federal Motor Carrier Act of 1935. I wish to call your attention to Section 34 of the said Alabama "Motor Carrier Act of 1939", which provides as follows:

"Section 34. The Act approved August 23, 1927 and known as the Alabama Motor Carrier Act of 1927, and the Act approved June 19, 1931 and known as the Alabama Motor Carrier Act of 1931, and the Act approved October 26, 1932, General Acts of Alabama, Extra Session 1932, pp. 178-190 are hereby expressly repealed."

You will note that the said Motor Carrier Acts of 1931 and 1932 and the Motor Carrier Act of 1927, upon which the construction found in the above named opinion of the Attorney General, under date of October 3, 1933, was placed, have been definitely repealed by the provisions of the said "Motor Carrier Act of 1939". No further consideration need be given, therefore, to the named opinion of the Attorney General, nor to the decision of the Interstate Commerce Commission of 1939, named by you, when consideration is given to the provisions of law above quoted and to Section 1 (f) of the said "Motor Carrier Act of 1939," quoted supra.

You will note that specific provisions of the definition of "common carrier by motor vehicle" found in the above quoted provisions of law include motor

vehicle operations of express companies without consideration of regular or irregular routes and/or fixed termini. I wish, however, to call your attention to Section 2 of the said "Motor Carrier Act of 1939", which provides in part as follows:

"Section Two. This Act shall not be construed to apply to: * * * (2) Motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof; or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous."

You will note that such motor transportation operations of express companies as may be done within the limits of a city or incorporated town or within the police jurisdiction; or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous, are exempt from the provisions of the said "Motor Carrier Act of 1939."

In my judgment, all motor transportation operations of express companies, other than those named in the above exemption, must necessarily be controlled by the provisions of the "Motor Carrier Act of 1939" from and after the effective date thereof.

I wish to further refer you to Section 35 of said "Motor Carrier Act of 1939", which provides as follows:

"Section 35. All laws or parts of laws in conflict or inconsistent with the provisions of this Act are hereby expressly repealed."

Premises considered, it is my opinion that the transportation activities of express companies, as named by you, are controlled by the provisions of the "Motor Carrier Act of 1939" from and after the effective date thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 19, 1940.

Dr. Douglas L. Cannon,
Director of County Organization,
Department of Public Health,
Montgomery, Alabama.

Mobile County Merit System Act—

Only the names of those persons engaged in actual service in the Classified Service, as defined by the act, on September 15, 1939, may be placed on the Employment Roster without standing the initial test provided for by the act (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, p. 298).

Mobile County Health Department—

Persons appointed on date of passage of act but whose appointment and employment was not to become effective until a later time held not entitled to be placed on Employment Roster without test provided by act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 2, 1940, in which you request my opinion as follows:

"The attached correspondence from the Health Officer of Mobile County is the basis for my request that you give me your opinion in the matter referred to by him."

The correspondence which you attach to your letter of inquiry is from Dr. O. L. Chason, Health Officer of Mobile County, and in substance it expresses Dr. Chason's request for information on the following question: Whether or not three present employees of the Board of Health of Mobile County who were appointed by the Health Officer and approved by the Board of Health at a meeting beginning at 12:15 P. M. and ending at about one P. M. on September 15, 1939, each of whom is paid in part or in whole from local funds and, therefore, admittedly a classified employee under the Mobile County Civil Service Act may be placed on the Employment Roster without standing the initial test provided for in the act or whether such employees are required to take the examination provided for in the act?

In response to a letter from this office seeking further information in the matter Dr. Chason was kind enough to forward a copy of the official minutes of the Board of Health of Mobile County for September 15, 1939, which minutes, as pertinent, are hereinbelow set forth:

"Meeting of the Board of Health was held today at 12:15 P. M. Dr. Mohr, Chairman, called the meeting to order with the following present: Drs. Mohr, Dodson, Hollis, and Weldon; and Dr. Chason, County Health Officer

"The Health Officer reported the resignation of Miss Howsmon effective September 30th and the appointment of Miss Mary Christian as Secretary. Dr. Dodson moved that the appointment of Miss Christian be approved. Dr. Hollis seconded the motion and it was adopted.

"The Health Officer reported that Mrs. Cranford would leave for study at Peabody College September 24th and appointed Miss Julia Beatty during her absence.

"The Board approved the appointment of Miss Beatty.

"The Health Officer stated that in the event that portion of the salary for a clerk-investigator is provided by the State, he would recommend the appointment of Miss Ruth Gray Bowling for the position.

"Dr. Dodson moved in the event the position matures that the appointment of Miss Bowling be approved. Dr. Hollis seconded the motion and it was adopted."

It appears from the foregoing minutes that Miss Mary Christian's appointment, although made on September 15, 1939, was not effective until September 30; that Miss Julia Beatty's appointment was to become effective on September 24, she being appointed to act during the absence of Mrs. Cranford who it appears would depart on an educational leave of absence on that date; that the appointment of Miss Ruth Gray Bowling was provisional—her employment depending on the contingency that certain funds would be forthcoming and on the further contingency that the position matured.

Section XII of Act No. 470, H. 952, approved September 15, 1939 (Local Acts, 1939, p. 298) provides, in pertinent part, that:

"The names of persons employed in any Classified Service at the time of the passage of this act shall be placed on the Employment Roster without standing the initial test herein provided for and shall be subject to the provisions of this act." (Emphasis supplies)

It is to be noted that only those persons who were "employed" in the Classified Service at the time of the "passage" of the act are permitted to be entered on the Roster without first taking an examination. The time of the passage of the act was September 15, 1939. *Ex Parte Parks*, 225 Ala. 8, 141 So. 914; *Jemison v. Town of Ft. Deposit*, 21 Ala. App. 331, 108 So. 396. Accordingly, those persons employed in any Classified Service on September 15, 1939, are entitled to have their names placed upon the Employment Roster without standing an initial test.

It thus appears important to determine the meaning of the word "employed" as used in the above quoted excerpt from Section XII.

In my opinion, the word "employed", as therein used, means the actual engagement in the discharge of the duties of the position or office of which such person is an employee or officer. The Legislature in enacting the provision for preference to persons employed at the time of the passage of the act intended to give preference to those persons in office because of the great weight which experience on the job to be performed has over all other qualifications. In order, therefore, to give full effect to the legislative intent in this regard, it is my opinion that the word "employed" as used in the statute must be construed to connote not only the status of being employed but actual service in such employment. Cf. *Sovereign Camp W. O. W. v. Craft*, 208 Ala. 467, 470, 94 So. 831; *Id.* 210 Ala. 683, 91 So. 167. Also see Words and Phrases, "Employed."

When the meaning which we have herein ascribed to the word "employed" is applied to the three persons appointed by the Mobile County Board of Health, it at once appears that such persons were not in fact employed on September 15, 1939, the date of the passage of the act. Miss Christian was not to be so employed until September 30, Miss Beatty until September 24, and the time for the employment of Miss Bowling does not definitely appear.

You are, therefore, advised that neither of the parties comes within the excepted class noted in Section XII, supra.

The opinion rendered under date of January 3, 1940, to Hon. P. B. Hamilton, Chairman, Personnel Board, Mobile County, is not here applicable. The subject there treated was the effective date of the act as applying to provisional appointments. Here the provisions of Section XII, supra, relate not to the "effective date of the act" but to the date of passage of the act."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 19, 1940.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Courts of County Commissioners—Boards of Revenue—Constitutional Law—Construction of Act No. 662, H. 703, approved July 3, 1940—

That provision of Act No. 662, supra, increasing compensation for each member of the courts of county commissioners and boards of revenue of the several counties of the State not to become operative during the present term for which said members have been elected or appointed, but will apply to their successors or to them if and when elected to succeed themselves.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for an official opinion, dated July 10, 1940, is as follows:

"I have just been informed, altho' I have not seen a copy of the bill, that the pay of commissioners in counties operating under our general laws is increased from three to four dollars per day effective as of the day of the signing of the bill by the governor.

"This question will come up in nearly every county in the state and we will all be confronted with the proposition as to the date when this increase will begin. If I remember correctly we run into the proposition of increasing or decreasing the pay of an official during his term of office. Since this is the case won't you advise me before the next term of commissioners court as to the law governing this increase?"

In answer to your inquiry, I wish to advise that Section 6771 of the Code of Alabama, 1923, was amended by Act No. 662, H. 703, approved July 3, 1940. Said section, as amended, is as follows:

"6771. Compensation of County Commissioners. Each member of the Court of County Commissioners, or Board of Revenue, in each of the several counties of the State of Alabama shall be paid for their services the sum of \$4.00 per day while occupied in the discharge of their duties as such member of the Court of County Commissioners or Board of Revenue, and 5c per mile in going to and returning from their respective courts, and the sum of \$4.00 per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing any of the County bridges or County buildings, roads or works, and 5c per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the County Treasury on the order of the Court of County Commissioners, or Board of Revenue. No allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order by the Commissioners Court previously made. The per diem and mileage of such member for services rendered when letting out, inspecting and accepting, building, or repairing any of the County bridges, roads or works, shall be paid out of any money in the County Treasury, which shall be designated and set apart by the Commissioners Court, or Board of Revenue of their respective Counties for the payment thereof. Provided, that this Act shall not operate to repeal any local law affecting any county with respect to the matters contained in this Act.

"Approved July 3, 1940."

It will be noted that Section 6771, as amended, provides, among other things, for an increase of from \$3.00 to \$4.00 per day for each member of the courts of county commissioners or boards of revenue of the several counties of the State while occupied in the discharge of their official duties, without the imposition of additional duties. It is provided, however, that said act should not operate to repeal any local law affecting any county with respect to matters contained therein. This then presents the question as to when this increase shall become operative in the counties so affected.

It is true that when an act makes no provision for the time of its taking effect, such as Act No. 662, supra, it becomes operative from the date of its approval. *Montgomery Traction Co. v. Knabe*, 158 Ala. 461, 48 So. 501. It is also true that Section 281 of the Constitution of Alabama of 1901 provides that "the salary, fees, or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof shall not be increased or diminished during the term for which he shall have been elected or appointed." Thus it would appear, in view of the fact that members of courts of county commissioners and boards of revenue are officers within the meaning of Section 281 of the Constitution of Alabama of 1901 and no new and additional duties were imposed. (*Moon v. Thompson, Judge of Probate*, 238 Ala. 356, 191 So. 211; *Carnley, Judge, v. Moore*, 218 Ala. 274, 118 So. 409), that Act No. 662, supra, would be unconstitutional as repugnant to said section. However, our Supreme Court in the case of *State Docks Commission v. State ex rel. Jones*, 227 Ala. 521, 150 So. 537, in construing the effect of Section 281 and certain other sections of our constitution upon the well-known Lapsley-Lusk Act (Act No. 138, S. 183, approved April 14, 1933, General Acts of Alabama, Extra Session, 1933, page 124), said as follows:

"The limits set forth in said sections would in no sense impair the validity of such an act. They would only affect the date at which the various provisions of the law would go into effect. It was necessary to fix different effective dates as, otherwise, the act would by virtue of law have, of itself, been an attempt to put all its provisions into effect from and after its approval by the Governor. *Montgomery Traction Co. v. Knabe*, 158 Ala. 461, 48 So. 501. These constitutional provisions must be read into every enactment, and such an enactment, unless otherwise expressed in the act itself, would go into effect at once or at such times as prescribed by the act as to all officers and employees not protected by the above sections of the Constitution, and as to the officers and employees named in said sections it would not go into effect during the term for which they had been elected but would apply to their successors or to them if and when elected to succeed themselves." (Emphasis supplied)

From the reading of the above quoted excerpt, it will be seen that the sole effect of Section 281 of the Constitution on that provision of Act No. 662, supra, herein being considered, is to postpone the date the same goes into effect. That is to say, it will not go into effect during the present term for which the members of the courts of county commissioners or boards of revenue of the several counties of the State have been elected or appointed, but will apply to their successors or to them if and when elected to succeed themselves.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 20, 1940.

Hon. A. L. Nettles,
Tax Collector,
Monroe County,
Monroeville, Alabama.

Poll Tax—Military Service as Exemption—

1. Persons who honorably served in the Army or Navy of the United States during the period between January 1, 1917, and November 11, 1918, are exempt from payment of poll tax.
2. Active officers and enlisted men of the National Guard are exempt from payment of poll tax.
3. Persons who are permanently disabled and whose taxable property does not exceed \$500 are exempt from payment of poll tax.
4. Military service, except in the above cases, does not carry poll tax exemption.

Opinion by Assistant Attorney General Osborn.

Dear Sir: •

I have your letter of July 10, 1940, in which you request my opinion as follows:

"Is there any exemption from the payment of poll tax in favor of a person now in the military or naval service of the United States?"

"This question is presented to me every year and I would appreciate a ruling from you thereon. I understand there is an exemption in favor of persons in the National Guard and Naval Militia of Alabama, (Acts 1936, Page 108) but I do not find any exemption for military service of the United States other than that in favor of World War veterans.

"I enclose a newspaper clipping which states that an exemption exists in favor of 'those who are in military service'. There is an impression among a number of people that the exemption extends to all persons who are now in the military service of the United States and this clipping was given me to prove the point."

Your specific question appears to have been presented to this office for a ruling in an opinion to the Judge of Probate of Escambia County under date of January 14, 1930, found in Biennial Report of Attorney General, 1928-30, page 731, wherein said question was answered in the negative. However since the statutes mentioned therein have been amended, and because of the length of time since the rendition of that opinion, I deem it advisable to answer your inquiry with an official opinion directed to you.

I advise that your inquiry should be answered in the negative and that the holding of the opinion cited above is still in force and effect.

Amendment No. XIV of the Constitution of Alabama, 1901, reads as follows:

"No person who honorably served in the military or naval service of the United States, between January 1st, 1917, and November 11, 1918, shall be required to pay the poll tax mentioned in the constitution of Alabama; such persons shall be exempt from the payment of all poll taxes which have accrued or may hereafter accrue. This section shall be self-executing and retroactive. The judges of probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the governor."

It will be noted that only those men serving in the armed forces of the United States during the time set out above are exempt from payment of poll tax under this amendment. See the opinion to Hon. J. P. Mitchell, Judge of Probate, Henry County, under date of March 11, 1940, found in Quarterly Report of Attorney General, Vol. XVIII, page 305, and the opinions cited therein.

Your attention is called to Section 4 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774), amending Section 11 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, Extra Session, 1936, page 105) (the Military Code of Alabama, 1936), which reads in pertinent part as follows:

"Section 11. EXEMPTION FROM POLL TAX, STREET TAX AND JURY DUTY: Owing to liability to call for military duty during their term of service, every officer and enlisted man of the National Guard and Naval Militia of Alabama shall be exempt from poll tax; provided that every person who shall have served an aggregate of twenty-one years in the active National Guard or Naval Militia of Alabama shall be thereafter forever exempt from poll tax. * * *"

It will be observed that this act exempts only active officers and members of the National Guard and the Naval Militia of Alabama, or those who have served an aggregate of twenty-one years. See opinion to Hon. T. C. Almon, Judge of Probate, Morgan County, under date of December 5, 1939, found in Quarterly Report of Attorney General, Vol. XVII, page 338.

It has been held in an opinion to Hon. E. L. Hurst, Judge of Probate, Etowah County, under date of January 11, 1940, found in Quarterly Report of Attorney General, Vol. XVIII, page 36, that reserve officers of the United States Army are not exempt from payment of poll tax.

The premises considered, I advise that a person now in the military or naval service of the United States is not, for that reason, exempt from payment of poll tax.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 20, 1940.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Licenses—Money Lenders—Revenue Act, 1935, Schedule 93½, Sub-division 2—

The license tax levied on so-called "money lenders" under Schedule 93½, Subdivision 2, of the Revenue Act of 1935, is not invalid on any constitutional ground, or by reason of alleged discrimination, or lack of equality or uniformity, due to exemption of banks or lenders on real estate mortgage security, in certain instances, from payment of said license tax.

Said license tax on money lenders is not offensive to any provision of the State or Federal Constitution.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 12, 1940, is as follows:

"Some of the local money lenders are objecting to the license and privilege tax in Schedule 93½.1 on the following grounds:

- "1. That it discriminates between members of the same class.
- "2. That it classes money lenders with banking institutions in arriving at Excise Tax, but requires license of money lenders and exempts banking institutions.
- "3. Because it discriminates between money lenders and state banking institutions.
- "4. The distinction is based on a fictitious and not a substantial basis.
- "5. That the classification is unreasonable and the application offends the requirements of equality and uniformity.
- "6. The exemption of state banking institutions from the license and privilege taxes in Schedule 93½.1 is a subterfuge to shield one class and unduly burden another.
- "7. That it is unlawfully oppressive in its administration.
- "8. That it abridges the privileges and immunities of a citizen of the United States provided by the 14th Amendment of the United States Constitution.
- "9. That it denies a person of the equal protection of the laws as provided by the United States Constitution.

"Please advise me whether or not these objections to the validity of the Schedule are good, and whether or not the reasons justify non-payment of the tax."

Schedule 93½ of Section 348 of the Revenue Act of 1935 (General Acts, 1935, page 476) imposes a license or privilege tax upon three classes of business operations, to-wit:

Class 1, "discounting or buying conditional sales contracts" and other evidences of debt therein specifically enumerated.

Class 2, "lending money on salaries or making industrial or personal loans."

Class 3, "lending money on mortgages secured by real estate."

For each class a different scheme or schedule of license tax is prescribed. The statute also exempts certain persons and corporations from its operation, to-wit: certain federal agencies; charitable religious, educational or fraternal organizations or institutions; state and national banks; and bona fide residents of Alabama and fiduciaries lending their own money or trust funds on real estate mortgage security.

Nowhere do we find the term "money lenders" employed. It may reasonably be inferred, however, that such persons are embraced in the second class or subdivision of the Schedule, to-wit: "persons lending money on salaries or making industrial or personal loans."

The question is whether the statute discriminates against such "money lenders" by imposing upon them a scheme of license taxation differing radically or substantially from that imposed on the two other classes of persons lending money or discounting or purchasing evidences of debt; or whether the statute offends any constitutional provision, State or Federal.

The exact question has not been raised or decided in any court of last resort in this state, apparently. But, in my opinion, it is readily answered upon principle and authority.

It has been said that what the individual does in the operation of a business is amenable to taxation equally with his property, if the classification for the purpose of such taxation is not tyrannical or arbitrary. **Chas. C. Steward Machine Co. v. Davis**, 301 U. S. 548, 81 L. ed. 1279, 109 A. L. R. 1293.

The one test is whether the particular classification satisfies the fundamental requirement of equality or uniformity, or whether there is an arbitrary and unreasonable discrimination in the matter of classification. If the tax operates upon all alike who engage in the particular avocation, occupation or business subjected thereto, the test is met, and the classification is unobjectionable. 37 C. J. 201, 202, 203, note 45; **State v. Kartus**, 230 Ala. 352, 357, 162 So. 533, 538; 26 Ala. App. 446; **American Bakeries Co. v. City of Huntsville**, 232 Ala. 612, 168 So. 880, 299 U. S. 514; **Frazier v. State Tax Commission**, 234 Ala. 353, 175 So. 402, 110 A. L. R. 1479; **Phoenix Carpet Co. v. State**, 118 Ala. 143, 22 So. 627; **Mutual Loan Company v. Martell**, 222 U. S. 225, 235.

Constitutional requirements as to uniformity (Constitution of 1901, Sections 211, 217) relate only to direct taxes on property and do not operate to limit the legislative power as to occupation or privilege taxes. 37 C. J. 197, Section 51; **Nachman v. State Tax Commission**, 233 Ala. 628, 173 So. 25.

The classifications embraced in the statute under consideration (Section 93½, supra) licensing the business or occupation of lending money generally are based on the manner and form of carrying on that business. I find nothing arbitrary, unreasonable, tyrannical or oppressive in such classification.

In *American Bakeries Co. v. City of Huntsville*, supra, it was contended that a municipal ordinance imposing a license tax on itinerant dealers in bakery products was invalid in that the license was greater in amount than that imposed by the same taxing authority on dealers with a fixed local place of business.

The objections urged by the so-called "money lenders," above recited and numbered in the request for this opinion, may be consolidated and summarized as (1) lack of equality and uniformity, or discrimination, as between them and other money lenders, to-wit: chartered banks and persons lending on real estate security; and (2) violation of the 14th amendment and due process clauses of the Federal Constitution.

The same objections were urged in the *American Bakeries Company* case, supra, and were held unavailing. See also *State v. Kartus*, supra.

Those cases and the ample authority on which they were based, are, in my opinion, conclusive, in this instance, to the effect that the aforementioned objections are without merit.

I am of the opinion, therefore, that, answering your questions categorically, the objections to the validity of the schedule are not good, and that the taxes imposed by said schedule on money lenders must be paid.

In an opinion rendered February 20, 1940, to Hon. Chester Walker, Judge of Probate, Tuscaloosa County (Quarterly Reports of Attorney General, Vol. XVIII, page 263), it was ruled that "money lenders" are subject to the license tax imposed by Schedule 93½.1 (which should be cited as Schedule 93½, subdivision 2) of the Revenue Act of 1935 and also to the excise tax under Sections 346.1-356.6 imposed on financial institutions, as amended.

In that opinion the question as to validity of said Schedule 93½ as applied to money lenders was not raised or discussed. The aforementioned ruling is re-affirmed. The fact that money lenders must pay both the licenses and the excise taxes does not in my opinion affect the conclusion hereinabove stated.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 22, 1940.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Capitol.

Constitution—Statutes—Section 45 of Constitution of 1901—

Act No. 654, H. B. 385, approved July 5, 1940, is not violative of Section 45 of the Constitution of 1901.

Opinion by Assistant Attorney General McCall.

Dear Madam:

This is to acknowledge receipt of your letter of July 18, 1940, in which you request my opinion as follows:

"I hand you herewith a copy of House Bill 385, by Representative W. M. Beck, which passed the Legislature and has been approved by the Governor.

"For the benefit of the Finance Director, who has to approve the expenditure of the appropriation, will you please construe the Act in particular:

"1. On the point concerning the caption of the Act and its contents."

Act No. 654, H. B. 385, approved July 5, 1940, to which you refer is as follows:

"AN ACT To appropriate out of any money in the State Treasury not otherwise now appropriated the sum of \$5 000 to place on the grounds of the building now being erected in Montgomery, Alabama, known as the Memorial Building a monument dedicated to the memory of the Spanish-American War Veterans of Alabama, and World War Veterans of Alabama.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. There is hereby appropriated out of any money in the State Treasury not otherwise now appropriated the sum of \$5,000 to be expended by the Governor for the purpose of erecting on the grounds of the building now being erected in Montgomery, Alabama, known as the Memorial Building a monument dedicated to the memory of the Spanish-American War Veterans of Alabama, and World War Veterans of Alabama, and each of said monuments shall not cost over Twenty-five Hundred Dollars (\$2500.00).

"Section 2. Be it further enacted that the State Comptroller is hereby empowered and directed to draw his warrant in the sum of \$5000.00 to the Governor for said purpose.

"Section 3. This Act shall become effective upon its passage and approval by the Governor, or is otherwise enacted into law.

"Approved July 5, 1940."

Section 45 of the Constitution of 1901, reads in pertinent part as follows:

"The style of the laws of this State shall be: Be it enacted by the Legislature of Alabama, which need not be repeated, but the act shall be divided into sections for convenience, according to substance; and the sections designated merely by figures. Each law shall contain but one

subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; * * * (Emphasis supplied)

The requirement that the subject shall be "clearly expressed in the title", is to direct the attention of the Legislature and the interested public to the theme of the pending legislation, to avoid laws passed under deceptive or misleading titles. A title should be liberally construed and an Act will be upheld if there is a substantial compliance with the constitutional requirement. If the words used in the title, taken in any sense or meaning they will reasonably bear, are sufficient to cover the provisions of the Act, the Act will be sustained. *Gibson v. State*, 214 Ala. 38, 106 So. 231; *First National Bank of Eutaw v. Smith*, 217 Ala. 482, 117 So. 38.

Wherever there is a natural and proper relation of the provisions embodied in a statute to the subject expressed in the title the constitution is not violated. *Summerhill, et al. v. Tapp*, 52 Ala. 227.

A careful reading of the title to Act No. 654, supra, and the provisions of the Act shows clearly that they express only one general subject and the Act, in my opinion, is not violative of Section 45 of the Constitution of 1901.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 22, 1940.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

Act No. 648, Senate Bill 444—States—Officers—Solicitors—Words
and Phrases—Statutes—

The words "other necessary equipment" as used in Act No. 648, Senate Bill 444, approved July 10, 1940, includes whatever things are proper, useful and suitable to the office of the solicitor, in the discharge of the duties imposed upon him by law.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 16, 1940, in which you request my opinion as follows:

"We enclose copy of Senate Bill No. 444, Gov. No. 648, which requires that the State shall furnish to the Circuit Solicitors, Deputy Circuit So-

licitors and Assistant Deputy Circuit Solicitors telephone service, stationery, stamps, and other necessary equipment for the use of such offices and officers.

"I will appreciate your interpretation of 'other necessary equipment.'"

Section 1 of Act No. 648, S. B. 444, approved July 10, 1940, to which you refer, is as follows:

"Section 1. That the several counties of the State are hereby authorized, directed, and required to provide suitable offices for the use and occupancy by the circuit solicitors, deputy circuit solicitors, and assistant deputy circuit solicitors, in the county where such officers reside; and the State shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such offices and officers." (Emphasis supplied)

The above quoted section originally appeared in Act No. 329, H. B. 147, approved July 31, 1939. This Act did not carry any appropriation to carry out its provisions. Quarterly Report of Attorney General, Vol. XVII, p. 300. However, Section 2 of Act No. 648, supra, does carry such appropriation to carry out the provisions of the Act. The word "necessary" means convenient, useful, appropriate, suitable, proper, or conducive to end sought, and does not mean absolutely essential. *Parker v. Pace & Davis*, 82 S. W. (2d) 259, 190 Ark. 950.

The term "necessary" is not limited to such things as are absolutely indispensable but includes all such things as are proper, useful, and suitable for the purpose. *Garfield County Commissioners v. Isenberg*, 61 P. 1067, 10 Okla. 378.

In the Century Digest the verb "equip" is defined as meaning "to fit out; furnish with means for the prosecution of a purpose; provide with whatever is needful for efficient action or service"; the noun "equipment" as meaning "anything that is used in the equipping, such as furniture, etc."

The premises considered, I am of the opinion that the words "other necessary equipment" includes the visible, tangible furniture, fixtures and filing cabinets, typewriters and other apparatus which are usual and necessary for the operations conducted by a solicitor. It includes whatever things are proper, useful and suitable to the office of the solicitor in furtherance of the discharge of the duties imposed upon him by law. Cf. Biennial Report of Attorney General, 1928-30, p. 196; Quarterly Report of Attorney General, Vol. XVIII, p. 307.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 22, 1940.

Hon. L. D. Dix, President,
Mobile County Jury Commission,
County Courthouse,
Mobile, Alabama.

1. Clerk of the Jury Commission of Mobile County not affected by the provisions of the State Merit System Act.
2. Clerk of the Jury Commission of Mobile County comes within the provisions of the Merit System Act applicable to Mobile County.

Opinion by the Attorney General.

Dear Sir:

I have your letter of some time back, in which you request my opinion as follows:

"The Jury Commission of Mobile County would like to have you advise as to whether or not, in your opinion, the position as Clerk of the Jury Commission, provided for in the Act approved March 2, 1939, establishing the Jury Commission in the several counties in the state, comes under the State Civil Service law.

"We would also like to have your opinion as to whether or not this position comes under the act providing for classified service for the City and County of Mobile, passed at the recent session of the Legislature.

"Please send us a copy of the State Civil Service Act, if same is in convenient form."

The delay in answering your request has been occasioned by the difficulty of the questions presented therein. Act No. 59, S. 55, approved March 2, 1939 (General Acts, 1939, page 86), is the statutory law under which the jury commissions of the state, with a few exceptions, now function. I call your attention to the provisions of Sections 3, 5 and 8 thereof, which are respectively as follows:

"Section 3. That within ninety days after the passage and approval of this Act, the Governor shall appoint the members of the several Jury Commissions who shall constitute said several commissions who shall constitute said several commissions during the Governor's tenure of office and until their successors are appointed and qualified, and thereafter the Governor shall appoint the members of said Jury Commissions for and only during the tenure of office of the Governor making the appointment and until their successors are appointed and qualified."

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars (\$5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the County treasury upon the warrant of the probate judge of the county. Such

warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Commission shall not exceed for any year of his term the following amounts, viz: * * *

"Section 8. * * * In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent Federal Census, the Commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the Jury Commission, the sum of Five Dollars (\$5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. * * *" (Emphasis ours)

The act above referred to is in all respects silent as to whether or not the clerk of the jury commission is subject to the provisions of any merit system act, whether general or local.

I am of the opinion, however, that your first inquiry should be answered in the negative. The provisions of the Merit System Act, Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68) specifically exempt "clerks of county jury boards." The pertinent part of Section 10 of the Merit System Act above referred to is as follows:

"Section 10. EXEMPT, CLASSIFIED AND UNCLASSIFIED SERVICE. Positions in the service of the State shall be divided into the exempt, the unclassified and the classified service. A. The exempt service shall include: * * * (3) Officers, attendants, employees of the circuit courts, clerks of county jury boards, and deputy circuit solicitors." (Emphasis supplied)

It is to be noted that the words "clerks of county jury boards" are used rather than "clerks of county jury commissions." This is accounted for by the fact that the Jury Commission Act and the Merit System Act were approved on the same date and unquestionably at the time the Merit System Act was drafted and introduced into the Legislature there were not then in existence county jury commissions. It is my opinion, however, that the exemption of "clerks of county jury boards" as contained in the Merit System Act, supra, applies to clerks of county jury commissions provided for in Act No. 59, supra.

The answer to your second question is more difficult. It is my opinion, however, that the clerk of your county jury commission is under the provisions of Act No. 470, H. 952, approved September 15, 1939, which act is applicable to Mobile County and the municipalities therein (Local Acts, 1939, page 298). It has been suggested that the fact that the Legislature specifically excluded from the operation of the State Merit System Act clerks of the jury boards indicates that the Legislature looked upon such clerks as State officers or employees, and, therefore, such clerks were not intended by the same Legislature to be under the provisions of a merit system act applying to one county in the State.

I do not think this position is tenable, however, in view of the express terms of Act No. 470, supra. In Section 1 of Act No. 470, supra, "classified service" is defined as follows:

"'Classified service' includes all offices, positions, and employment in Mobile County or any such city therein as these offices, positions and employment now exist or as they may hereafter exist, the holders of which are paid either by salary, wages or fees in whole or in part from funds of Mobile County or any such city, or the holders of which receive their compensation from any elected official and perform duties pertaining to the office of such elected official or officer, except those placed in the 'Unclassified Service' by Section 2 hereof."

Section 2 of Act No. 470, *supra*, defines "unclassified service," and in pertinent part is as follows:

"The following shall be in the Unclassified Service: * * * (6) Persons in the 'Classified Service' within the meaning of and subject to the State of Alabama Merit System under any present or future law, so long as any such law remains effective."

Under the terms of the jury commission act, *supra*, the Clerk of the Jury Commission of Mobile County receives his compensation from Mobile County and, therefore, in my opinion, comes within the definition of classified service as defined in the Mobile Civil Service Act, *supra*, unless he has been placed in the unclassified service as defined in Section 2 of that act.

Clerks of jury commissions, as I have heretofore pointed out in this opinion, are not in the classified service of the State of Alabama under the State Merit System Act and, therefore, are not exempt from the Mobile Civil Service Act by subdivision (6) or any other subdivision of Section 2 thereof.

I do not believe that the answer to your question necessarily depends on whether or not the Clerk of the Jury Commission of Mobile County is a State or a County employee. In my opinion, the answer to your question necessarily depends on the express provisions of the Mobile Civil Service Act itself.

Recapitulating, it is my opinion: First, that the Clerk of the Jury Commission of Mobile County does not come within the provisions of the State Merit System Act. Second, that the Clerk of the Jury Commission of Mobile County does come within the provisions of the Mobile Civil Service Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Enclosure—Copy of Act No. 58, S. 44, approved March 2, 1939.

July 22, 1940.

Hon. Joe M. Bonner,
Deputy Solicitor,
Wilcox County,
Camden, Alabama.

Counties—Wilcox County—

Act No. 463, S. 397, approved September 13, 1939, page 261 (Local Acts, 1939, p. 261), discussed generally.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of July 11, 1940, follows:

"Under Senate Bill No. 397 by Mr. Henderson on Page 262 of the General and Local Laws of Alabama passed during the Legislative session of 1939, Section 2 provides, among other things, that the Court of County Commissioners of Wilcox County, Alabama, shall have no more than twenty four regular and special meetings during one year. It is also provided that executive sessions of the Court are expressly prohibited. Please explain the difference, if any, between a call or special meeting and an executive session. Our County Commissioners have already had twenty four meetings during the fiscal year and there are three more months before the fiscal year expires. Of course we have three more regular meetings to be held, and, under our road building plan it is going to be absolutely necessary to have several more call meetings. Do you construe the above legislation to mean that under no circumstances more than twenty-four meetings can be held during a fiscal year?

"Under Section 21 of the same bill, on page 269, it is provided, among other things, that the provisions of this act relating to election of associate members of said Court in 1940, and to repeal of the act of February 2, 1937, shall become effective immediately upon the passage and approval of this act—and all other provisions hereof shall become effective on the first Monday after the second Tuesday in January, 1941. Do you construe this Section to mean that the above mentioned Section 2 is in effect now, or will it become effective in 1941?"

You ask in the above request that I explain the difference, if any, between a called or special meeting and an executive session of the Court of County Commissioners of Wilcox County.

Section 2 of Act No. 436, S. 397, approved September 13, 1939 (Local Acts of 1939, page 261), reads as follows:

"Section 2. MEETINGS: That the Court of County Commissioners of Wilcox County shall sit in regular session on the second Monday of each month. By direction of the Judge of Probate and notice in writing signed by the Judge of Probate and delivered to each member of the

Court, special meetings may be held, provided that not more than a total of 24 (twenty four) regular and special meetings are held in one year. Executive sessions of the Court are hereby expressly prohibited."

It will be noted that by the above section executive sessions of the Court of County Commissioners of Wilcox County are expressly prohibited.

It is a well known rule of statutory construction that words used in a statute are to be given their ordinary, common and accepted meaning. **American Bakeries Co. v. City of Opelika**, 229 Ala. 388, 157 So. 206; **Edwards v. Doster-Northington Drug Co.**, 214 Ala. 640, 108 So. 862.

The common, ordinary and accepted meaning of the words "executive session" is that a legislative or executive body sits in a closed meeting. That is to say, that only members of such body are allowed to be present at the meeting and all other persons are excluded therefrom. Whereas, in a called or special meeting of said Court of County Commissioners of Wilcox County it would be permissible for any person to be present at the time said board was in session.

You further ask whether I construe Section 2 of Act No. 436, supra, to mean that only twenty-four meetings of the Court of County Commissioners of Wilcox County can be held during any one year.

It is a rule of statutory construction that where the language used in a statute is clear, concise and unambiguous there is no room to construe said statute. **Alabama Digest, Statutes, Key No. 190**, and cases cited thereunder; **State v. Praetorians**, 226 Ala. 259, 146 So. 411.

The language used in Section 2 of Act No. 436, supra, in this regard is clear, concise and unambiguous.

You are therefore advised that I construe said section to mean that no more than twenty-four meetings of said board can be held during any one year, twelve of which must be regular meetings held on the first Monday of each month, and twelve of which may be called or special meetings.

In answering your inquiry, as to the effective date of said Act in so far as the provisions of Section 2 are concerned, I refer you to Section 21 of Act No. 436, supra, which reads as follows:

"Section 21. **EFFECTIVE DATE:** The provisions of this act relating to the election of associate members of said court in 1940, and to repeal of the act approved February 2, 1937, shall become effective immediately upon the passage and approval of this act or its otherwise becoming a law, and all other provisions hereof shall become effective on the first Monday after the second Tuesday in January, 1941."

It will be noted from the above quoted section that the only part of Act No. 436, supra, which shall become effective immediately upon its approval by the Governor is the repealing of an act approved February 2, 1937, and the election of the members of said board. All other sections, parts and paragraphs of said act become effective as of the first Monday after the second Tuesday in January, 1941.

You are therefore advised that in my opinion the provisions of Section 2 of Act No. 436, supra, do not become effective until the first Monday after the second Tuesday in January, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 23, 1940.

Hon. L. J. Wright,
Member House of Representatives,
Talladega County,
Talladega, Alabama.

Jury Commission—Clerk—

A female may be appointed clerk of the jury commission.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated July 17, 1940 follows:

"I will thank you to advise me if it will be legal for the Talladega County Jury Commission to appoint as their Clerk a female resident of Talladega. I have a copy of the law, Senate Bill 55-Harris but do not know whether or not it would be legal. The Jury Commission at present has a male clerk who is to leave and the Commission desires a female appointment or selection. Thanking you to let us know at your earliest convenience, I am."

It is my opinion that your inquiry should be answered in the affirmative.

Under the provisions of Section 8 of Act No. 59, S. 55, approved March 2, 1939, (General Acts 1939, page 86) the jury commissions of the several counties of the State are authorized to employ a clerk. Section 9 of said Act, supra, makes provision for the oath to be taken by every clerk of a jury commission before entering upon the discharge of his duties. Said sections are as follows:

"Section 8. In Counties having seventy-five thousand population or less by the last Federal census preceding the employment, the clerk of the Circuit Court may be employed as the Clerk of the Jury Commission and in such counties the Clerk of the Jury Commission whether he be the clerk of the Court or not, shall be paid for his services rendered under the direction of the Jury Commission the sum of Five Dollars (\$5.00) per day while actually engaged in performing his duties, to be paid out

of the county treasury upon the order of the President of the Jury Commission. In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent Federal Census, the Commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the Jury Commission, the sum of Five Dollars (\$5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than two hundred thousand population according to the last or any subsequent Federal census, the Jury Commission in any such county shall have authority to employ such clerical assistance as such Commission deems necessary and proper, and may expend for such clerical assistance in compensation and in paying their reasonable and necessary expense in performing the duties of their employment a sum not to exceed Four Hundred and Fifty Dollars (\$450.00) per month to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having a population of 75,000 or less, according to the last preceding Federal census, the clerk of the Jury Commission shall not receive more than \$300.00 as compensation for his services in any one year."

"Section 9. Every clerk of a Jury Commission before entering upon the discharge of his duties under this Act, must take and subscribe the oath of office prescribed by Section 279 of the Constitution and file the same for record in probate office of the county."

It will be noted that the above sections place no restrictions upon a female being appointed clerk of a jury commission. Further, a careful study of the constitutional and statutory law of this State fails to disclose any restriction upon a female holding the position of clerk of a jury commission.

Therefore, it is my opinion that the Jury Commission of Talladega County may appoint a female to serve as its clerk.

See 46 C. J. Sec. 39, page 939.

Also opinion to Judge of Probate, Tallapoosa County, Dadeville, Alabama, Quarterly Reports Attorney General, Vol. XVI, page 293, where this office, in construing Section 8 of Act No. 59, supra, made the following statement:

"By the provisions of Section 8, the Jury Commission is permitted to employ a clerk, to be paid at the rate of Five Dollars per day while actually engaged in performing his or her duties to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having a population of 75,000 or less according to the last Federal Census, the clerk shall not receive more than \$300.00 as compensation for his or her service in any one year."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 23, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Excise Tax—Financial Institutions—Banks & Banking.

Where a municipal corporation after passage of the Revenue Act of 1935 undertook to levy a license tax on a financial institution, as therein defined, not having previously levied such tax, such financial institution is not entitled to a credit on the tax payable to the State under said Act in respect of any such alleged municipal license tax paid by it.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of April 17, 1940 follows:

"The General Motors Acceptance Corporation, a financial institution, filed an excise tax return under the provisions of the Excise Tax Law, Section 346 of the 1935 Revenue Act. The return was accompanied by a letter, dated April 4, 1940, signed by Mr. William D. Rhew, Assistant Secretary, asserting a claim for credit of \$300.00 to be used in reducing tax liability as shown by said return and, also, alleging overpayment of tax for the two previous years, 1937 and 1938, by reason of a similar credit each year. It is alleged that a license tax was exacted by the City of Montgomery and paid in the amounts above mentioned, pursuant to an amendment to the 1936 License Code, City of Montgomery, Section 282, paragraph "E." The credits are claimed by reason of the taxpayer's interpretation of Section 346.6 of the Excise Tax above referred to. The question has been considered by our Counsel, Honorable John W. Lapsley, whose memorandum is attached for your information and use in considering the issues. We also attach copy of the tax payer's letter referred to above.

"An opinion is requested as to whether or not the General Motors Acceptance Corporation has legal authority under the statute to claim a credit and reduce the excise tax liability for the year 1939 in the amount of \$300.00, representing the amount of license tax levied by the City of Montgomery and paid by the taxpayer in excess of the license tax heretofore legally levied and in effect. The same would apply to the refunds for prior years, subject, of course, to the one year statute of limitation for filing a claim.

"The effect of the taxpayer's interpretation of the law in this respect is far extended and very important from an administrative standpoint. We have at least one other claim of the same nature pending and, of course, many others will be submitted if the taxpayer's contention is sustained."

The constitutional validity of the provisions of the Revenue Act of 1935, above referred to, levying an excise tax, so-called, on certain money lending individuals, corporations and partnerships, therein collectively classed as "financial institutions," is not questioned or open to question.

Ex parte Bozeman, 183 Ala. 91, 63 So. 201;

Exchange Drug Co. v. State Tax Commission, 218 Ala. 115, 171 So. 673;

City of Birmingham v. Bergreen, 118 Ala. App. 636, 94 So. 195.

The question presented here is whether or not the **General Motors Acceptance Corporation** is entitled to a credit on the amount of tax due to the State under the provisions of Article XII, Chapter 1, of the 1935 Revenue Act, because of the payment by the said General Motors Acceptance Corporation of a flat license tax of \$300 to the City of Montgomery, which license tax was levied by the City of Montgomery subsequent to the date on which the 1935 Revenue Act went into effect. This question is then dependent on the answer to the question as to whether or not the City of Montgomery could legally levy a "flat" license tax on such financial institutions at a date later than on which the 1935 Revenue Act was approved.

Section 346.5 of the Act (Acts 1935, p. 432) as amended by Act No. 396, H. 779, approved September 13, 1939 (Acts 1939 p. 517) after providing for the division and distribution of the net proceeds of the said excise tax between the State, counties and municipalities of the State, reads in pertinent part as follows:

"No municipality or county * * * shall * * * levy or assess any such excise tax for the privilege of engaging in such business in addition to that hereby levied, * * * except license taxes not in excess of those heretofore legally levied and in effect." (Emphasis supplied).

The preceding sections of the Act define financial institutions, prescribe the method to ascertain their annual net income, to be shown on their annual returns, and levy an annual "excise tax" of six per cent of such net income. (Gen. Acts 1935, pp. 428-432, Sections 346.1, 346.2, 346.3).

Section 346.6 of the Act (Gen. Acts 1935, p. 433) reads as follows:

"346.6. All moneyed capital employed in the business the privilege of engaging in which is hereby taxed, and the shares of all financial institutions, as in this article defined, shall be exempted from assessment and payment of ad valorem taxes, except the moneyed capital and shares of any business hereby taxed which fails to make and file the returns required by this Article and to pay the tax levied by this Article as and when in this Article provided. The real estate owned by every such financial institution shall not be exempted. If any other tax, whether on property (other than ad valorem taxes on real estate), income, business or any element thereof, except license taxes not in excess of those heretofore legally levied and in effect, be hereafter levied by this State or by any political subdivision of this State on any financial institution as in this article defined, the amount of such other tax due by such institution shall be credited on account of the tax payable pursuant to the provisions of this article. Provided that no other tax levied by this Act shall be credited against the excise tax herein levied."

It is contended that the prohibition above quoted in part from Section 346.5, as amended, *supra*, against municipal or county license taxes, over and

above "those heretofore legally levied and in effect," in connection with Section 346.6, supra, must be limited or restricted to license taxes based on or measured by net income; and that said prohibition will not avail as against "flat" license taxes levied by municipalities, such as the \$300 "flat license tax" levied for the years 1937, 1938 and 1939 by the City of Montgomery after enactment of the Revenue Act of 1935.

No authorities are cited in support of this proposition. The argument is, however, that the words "such excise tax" were first occurring in the quoted prohibition, must be construed to refer to and include only excise taxes, measured by or based on the amount of net income of so-called financial institutions, leaving cities and towns free to levy "flat" licenses or excise taxes in any amount, at any time, regardless of past levies or lack of levies.

The entire argument is pinned or based on the word **such**. It is contended that it means necessarily "identical" or "income-measured" licenses, rather than license taxes in general.

In my opinion, this argument is unsound for the reason that the Legislature by expressly mentioning "license taxes not in excess of those heretofore legally levied and in effect," indicated it was necessary specifically to allow the municipality to collect the "flat" license taxes theretofore levied and in effect. Otherwise the prohibition against municipalities levying "any such excise tax for the privilege of engaging in such business in addition to that hereby levied," would have prevented the municipality from collecting flat license taxes.

To accord to the prohibition this narrow and restricted field of operation will, in my opinion, render it practically meaningless. Under such construction cities and towns, whatever their treatment in the past of "financial institutions" may have been, may in future pursue them with relentless fury, provided only they apply the "flat" rather than "income-measured" form of attack.

In my opinion, the use of the words "except license taxes not in excess of those heretofore legally levied and in effect," as used in the last sentence of Section 346.6 of the 1935 Revenue Act, supra, are not to be construed as indicating that municipalities may legally levy and collect flat license taxes after the date of the approval of the 1935 Revenue Act. It is my opinion that those words are incorporated in the last sentence of said section for the purpose of preventing the financial institutions from claiming credit on the amount due the State for flat license taxes paid to the municipality which were not in excess of the license levied and in effect prior to the date of the approval of the 1935 Act.

If we adopt the construction contended for by learned counsel for General Motors Acceptance Corporation, we see little or no point in the legislative prohibition against municipal imposition of license taxes on financial institutions. If a city, while receiving and accepting its portion, share or part of the income-measured and state-levied "excise" may make a flat license levy also, possibly equal in amount or greater even than such state derived portion, share or part, then in that event the taxpayer, taking credit against the state levy for the amount of flat city levy, under Section 346.6 above quoted, may, so far as it is concerned, destroy or reduce the state levy to zero.

In my opinion the legislature could not have intended or contemplated any such absurd result, by use of the word **such** in the context above indicated.

Volumes have been, and doubtless will continue to be, written as to the interpretation or construction of legislative enactment, as long as legislatures continue to enact legislation. Endless quotations might be made from the decisions of our courts, stating in varying form the rules or canons of construction. Apparent conflicts will necessarily arise, due to hasty or ill-considered use of words or language, and it is the function of courts and lawyers to resolve, if they can, such conflicts.

In a recent case our own Supreme Court well observed:

"The rule for interpreting an act of the legislature in this respect makes it the duty of the Court to harmonize and reconcile all parts of a statute so that effect may be given to each and every part: conflicting intentions in the same statute are never to be supposed or so regarded unless forced on the Court by unambiguous language. 59 Corpus Juris 999; Fidelity & Deposit Co. v. Farmers' Hardware Co. 223 Ala. 477, 136 So. 824; Blumberg Shoe Co. v. Phoenix Assur. Co., 203 Ala. 551, 84 So. 763."

Leath v. Wilson, 192 So. 417, 419 (1939).

The word "such" is defined (Webster's International Dictionary, unabridged) as follows:

(1) of this or that kind, character or measure; of the sort or character previously indicated or contextually implied; (2) having the quality already or just specified; (3) of the or that kind, character or extent; (4) of the same class, type or sort; in the same category; (5) before-mentioned; previously characterized or specified.

I am of opinion, therefore:

(1) That the City of Montgomery was not authorized to levy a "flat" license tax of \$300 against General Motors Acceptance Corporation for the years 1937, 1938 and 1939, or any of them, inasmuch as it levied no such license prior to enactment of the Revenue Act of 1935.

(2) That said corporation is not entitled to any credit against its excise tax payable to the State of Alabama by reason of payment of said alleged license tax to the City of Montgomery.

(3) That said corporation is not entitled to refund by the State of any alleged license taxes paid heretofore to said city.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 23, 1940.

Hon. Clyde C. Pearson, Secretary,
Board of Registration of Architects,
501 Dexter Avenue,
Montgomery, Alabama.

Architects—State Board for Registration of Architects—Licenses
and Revocation of Licenses—

1. State Board for Registration of Architects held authorized to revoke license of an architect if, in the judgment of the said Board, said architect was a person not "of good moral character" at the time license was granted.
2. State Board for Registration of Architects held authorized to revoke the license of an architect if, in the judgment of said Board, such license was obtained by deceit or fraud.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of June 8, 1940, in which you request my opinion as follows:

"At the State Board for Registration of Architects' meeting on June 4, the Board instructed me as Secretary to request an opinion from you as to whether the Board has grounds for revoking the certificate of (name omitted). You are familiar with the Examiner's report of the audit of the Board's records since the Board was organized in 1931 and the subsequent settlement by the Maryland Casualty Company.

"The Act is No. 417, House Bill 525, amended March, 1939."

In reply, I wish to call your attention to Section 8 of Act No. 167, H. 253, approved March 16, 1939 (General Acts, 1939, page 290), which amends Act No. 417, H. 523, approved July 17, 1931 (General Acts, 1931, page 514), and which sets out the persons to whom and the conditions upon which licenses may be issued by the Alabama State Board for Registration of Architects, the pertinent part of which is as follows:

"(A) Any person, of good moral character who is at the time of the passage of this Act, engaged in the practice of Architecture under a Certificate of Registration issued by said Board in this State and who shall present to the said Board an affidavit to that effect within ninety days, after the passage of this Act may be entitled to receive such certificate to practice architecture without an examination by said Board * * *"

You will note that one seeking a license under the terms of the above quoted statute must necessarily be a person of good moral character. If it be shown to the satisfaction of the State the requirement of good character, as set out in the above quoted provisions of law, the said State Board for Registration of Architects would be justified in refusing to grant the said applicant a license.

I wish to further call your attention to Section 9 of the above named Act of 1939, which amends the Act of 1931, named supra, which provides as follows:

"Section 9. The Board shall have the power to suspend for a definite period, or to revoke the certificate of registration of an architect registered hereunder who is found guilty of any fraud or deceit in obtaining a certificate of registration, or of gross negligence, incompetency, or misconduct in the practice of architecture as determined by the board at a hearing; notice of the nature of the charges which have been placed against him and the time and place of said hearing, must be served upon the accused by registered mail, with a return receipt requested, and addressed to his last known place of business, or residence, not less than ten (10) days before the date fixed for such hearing. In all cases of suspension, or revocation of a certificate of registration as herein provided for, the accused may appeal to the Circuit Court of Montgomery County, Alabama, in equity. Either party, the accused, or the Board, have the right to appeal from the final decree of said court as in such cases by law provided."

You will note that specific provisions for the revocation of the license of any licensee "who is found guilty of any fraud or deceit in obtaining a certificate of registration" is set out in the above quoted provisions of law governing revocation of licenses.

In my judgment, the prerequisite set out in Section 8, quoted supra, of good moral character, when read in connection with the above quoted provisions of Section 9 of the General Acts of 1939, supra, offers sufficient grounds for the revocation of the license of any licensee when it is determined by the Board for Registration of Architects that an applicant has in any way deceived the board as to his character.

It is my opinion, however, that these are matters which address themselves peculiarly to the discretion and determination of the said State Board for Registration of Architects.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 24, 1940.

Hon. Forest Castleberry,
Member, House of Representatives,
Montgomery, Alabama.

Conecuh County—Local Acts, 1931, page 128, Act No. 267, H. 675, approved June 16, 1931, construed—

1. Conecuh County Board of Revenue and Control held authorized to use any amount not to exceed forty percent of the Gasoline Excise Tax funds accruing to said county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 10, 1940, in which you request my opinion as follows:

"Your attention is called to Act 269, H. 675, approved June 16, 1931, Local Acts 1931, page 128, which Act authorizes and empowers the Board of Revenue of Conecuh County to use forty percent of the funds derived from the two cents excise tax on gasoline, etc., for the purpose of paying interest on and establishing a sinking fund for the retirement of any bonds of Conecuh County.

"It now appears that no bonds will be due from the period from January 1, 1941, to July 1, 1944, and the county has determined that it will not be necessary to set aside the entire forty percent of the funds in question, and would like if possible to reduce the percentage of the funds set aside. Will you please advise me therefore, whether in your opinion, the Board of Revenue and Control of Conecuh County, set up by the Legislature of 1939, may legally reduce the percentage of these funds used by it. In other words, if the Board of Revenue and Control desires to use twenty per cent of such funds instead of forty percent, would this be legal."

In reply, I wish to advise that in my judgment the answer to your question depends entirely on the legislative intent expressed in Act No. 269, H. 675, approved June 16, 1931 (Local Acts, 1931, page 128). You will note that Sections 1 and 2 of the act in question specifically provide, in part, as follows:

"Section 1. That the Board of Revenue of Conecuh County, be and hereby is, authorized and empowered to use forty per cent of the funds derived from the excise tax on gasoline, or other liquid motor fuels, levied under the act of the Legislature of Alabama, approved February 10, 1923 * * *."

"Section 2. That upon final payment of said bonds described in Section One of this Act all funds received by Conecuh County from the excise tax on gasoline or other liquid motor fuels shall be used as provided by the general laws of the State of Alabama."

I wish to refer you to Act No. 584, H. 982, approved September 19, 1939 (Local Acts, 1939, page 349), which act creates the Board of Revenue and Control of Conecuh County. Section 2 of said act confers the same powers, duties and authority upon the said Board of Revenue and Control as was formerly possessed by the Board of Revenue of Conecuh County, as follows:

"Section 2. GENERAL DUTIES, POWERS AND AUTHORITY. The said Board of Revenue and Control shall have all the duties, powers and authority now or hereafter required of or granted to and conferred upon courts of county commissioners, boards of revenue, or other like governing bodies, by the general laws of Alabama, except as the same may be in conflict with this act. The board shall also have all the duties, powers and authority heretofore required of or granted to and conferred by any local act for said county upon the Board of Revenue, Court of County Commissioner, or like governing body, except as the same may be in

conflict herewith. The chairman shall have and exercise all the duties, powers and authority required of or granted to and conferred upon probate judges in connection with courts of county commissioners, or other governing bodies, except as the same may be in conflict with this act."

The intention of the Legislature is the law. **Southern Express Co. v. City of Birmingham**, 164 Ala. 529, 51 So. 159. The rules of statutory construction for the purpose of arriving at the legislative intent, however, require that the language of a statute must be ambiguous or no construction is necessary. **Dixie Coaches, Inc. v. Ramsden**, 238 Ala. 285, 190 So. 92.

In my judgment, the term "forty percent" as used in the statute quoted, presents sufficient ambiguity to allow construction.

The courts have held that extrinsic matters may be looked to in an effort to determine legislative intent. This rule is expressed in 59 C. J. page 958, as follows:

"Other Guides to Intent. While the intent of the legislature is to be found primarily in language of the statute, where such language is vague, ambiguous, or uncertain, the court may look, not only to language but to the subject matter of the act, the object to be accomplished, or the purpose to be subverted; it may also look in this connection to the expediency of the act, or its occasion and necessity, the remedy provided, the condition of the country to be affected by the act, the consequences following upon its enactment, or various extrinsic matters which throw some light on the legislative intent. Logic and sound economic principles may serve as a guide to the legislative intent."

In the case of **Bragg v. State**, 134 Ala. 165, 32 So. 767, the court quoted approvingly the work of Mr. Endlich on Interpretation of Statutes, as follows:

"The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. That is, in the construction of a statute, as in that of other instruments, words are to be understood, not according to their mere ordinary, general meaning, but according to their ordinary meaning as applied to the subject matter with regard to which they are used, unless, indeed, there be something requiring them to be read in a sense which is not their ordinary sense in the English language so applied. * * *"

With the above cited rules of construction of statutes in mind, it is my judgment that the Legislature intended to give the county governing body of Conecuh County authority to use any amount up to, but not in excess of forty percent of the said Excise Tax on gasoline, that in their judgment would be necessary to effect the purposes set out in the considered act. It is therefore my opinion that the Board of Revenue and Control of Conecuh County may legally reduce the percentage of the said Gasoline Excise Tax funds used by it to any amount less than forty percent, if, in the judgment of the said

Board of Revenue and Control, such amount is sufficient to meet the needs of the sinking fund established for the paying of interest on and the retirement of any bonds of Conecuh County.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 24, 1940.

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Phenix City, Alabama.

Under the laws of the State of Alabama, probate judge held not authorized to issue marriage license under health certificate issued by an osteopath of a foreign state when said osteopath does not hold a certificate issued by the State Board of Medical Examiners under a reciprocal agreement between Alabama and said foreign state.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 17, 1940, in which you request my opinion as follows:

"Dr. Ben Williams, an Osteopathic Physician of Columbus, Ga., has issued a Health Certificate to an applicant to this office for a Marriage License. Dr. Williams informs me that he is a duly licensed Osteopath in the State of Georgia, and has been practicing for about 8 years. He states that under the reciprocal agreement between the State of Georgia and Alabama, that he has the right to issue this certificate, and that this office should accept same.

"The law says the certificate must be made by a physician licensed to practice in this State. Dr. Williams has no license to practice here. Will you please advise me as to whether or not I should accept a certificate from him."

In reply, I wish to refer you to Section 1157 of the Code of Alabama, 1923, which provides in pertinent part as follows:

"1157. Who may examine; charge for.—Examiners shall be physicians duly licensed to practice in this state. ***"

You will note that examiners offering health certificates to persons applying for marriage licenses shall be physicians duly licensed to practice in

this state. Your statement of facts sets out that Dr. Williams of Columbus, Georgia, states that under the reciprocal agreement between the State of Georgia and the State of Alabama, he has the right to issue this certificate and that you, as Probate Judge, should accept the same.

I wish to refer you to Section 2844 of the Code of Alabama, 1923, which provides as follows:

"2844. Board of medical examiners, reciprocal with those of other states.—The state board of medical examiners may establish reciprocal relations with similar boards of other states in reference to the issuance of certificates of qualification, provided that such reciprocal relation shall not be established with the state board of examiners of any state that does not require examination upon substantially the same branches of medical learning as those enumerated in section 2837(1627) of this Code, and does not maintain a standard of proficiency at least equal to that maintained by the state board of medical examiners of this state. When such reciprocal relations have been established, a certificate of qualification may be issued without examination to a persons who presents evidence that he has complied with the requirements of a reciprocating state board of medical examiners; provided that on the face of such certificate a statement shall appear that it was issued pro forma, and without examination."

You will note that under the provisions of the above quoted section of the Code of 1923 a certificate may be issued by the State Board of Medical Examiners, under a reciprocal agreement with a foreign state, authorizing the holder of such certificate to practice in Alabama, which certificate shall show on its face that it was issued pro forma, and without examination.

A conference with Dr. J. N. Baker, Secretary of the State Board of Medical Examiners, and an investigation of the records of the State Board of Medical Examiners, discloses that no certificate of qualification as provided for in Section 2844, supra, has been issued to Dr. Williams. I therefore advise you that no authority exists by which Dr. Ben Williams, the osteopath in Columbus, Georgia, as named in your request, can issue a health certificate to an applicant for a marriage license in Alabama. It is further my opinion that you, as Judge of Probate, have no authority to issue a marriage license upon a health certificate issued by the said osteopath.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 25, 1940.

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Poll Tax—Electors—Voters—

When a person otherwise qualified to vote fails to pay his poll tax on or before February 1 of any year, he thereby bars himself from voting at any election held prior to February 2 of the succeeding year.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 19, 1940, in which you request my opinion as follows:

"There have been a few in this County that contend a person may pay up back poll tax after October 1, 1940, and be able to vote in the general election in November by taking his poll tax receipts along with him to the polls.

"Section 361 of the Code of Alabama, in setting out the qualification of voters, provides in part: 'and who shall have been duly registered as an elector, and shall have paid, on or before the first day of February next preceding the date of the election at which he or she offers to vote, all poll taxes due from them for the year 1901, and for every subsequent year . . . '

"As you know, the official voting list is made up after the first of February of each year to be used for the general election in the Fall, and contains the names of all qualified voters who are entitled to vote during the year, except those who become qualified by registering at special registrations and whose names are placed on a supplementary list.

"Will you please give us an official opinion on whether or not a person who is due poll tax for back years, and whose names are not on the official list of qualified voters, may pay up their back poll tax after the first of October and be qualified to vote in the general election by presenting their poll tax receipts at the polls."

I call your attention to Section 178 of the Constitution of 1901, which reads in pertinent part as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have paid on or before the first day of February next preceding the date of the election at which he offers

to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; *** ." (Emphasis supplied)

This section of the Constitution was incorporated and made a part of the Code of Alabama of 1923 as Section 361, which provides in pertinent part as follows:

" *** and shall have paid, on or before the first day of February next preceding the date of the election at which he or she offers to vote, all poll taxes due from them for the year 1901, and for each subsequent year, shall be an elector, and shall be entitled to vote at any election by the people."

The identical question presented in your inquiry has been ruled upon on many occasions by this office and the uniform holding has been that persons who are duly registered but are delinquent in the payment of poll taxes subsequent to February 1 of a given year may not vote as an elector in any election held between February 1 of that year and February 1 of the next succeeding year. Biennial Report of Attorney General, 1928-1930, page 933; Biennial Report of Attorney General, 1928-1930, page 14; Quarterly Report of Attorney General, Volume I, page 249; Quarterly Report of Attorney General, Volume VIII, page 252; Biennial Report of Attorney General, 1936-1938, page 378.

I adhere to the rulings heretofore made by my predecessors and I am of the opinion that persons who owe back poll tax which they pay between October 1 of a given year and the time of the holding of the general election held in that year are not entitled to vote in said general election.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 25, 1940.

Hon. W. H. MacGregor, Secretary-Treasurer,
Board of Control, Teachers' Retirement System,
Montgomery, Alabama.

Merit System Act—Teachers' Retirement Act—

1. Secretary-Treasurer, appointed by the Board of Control under the Teachers' Retirement Act, is not in the "Exempt Service," but may be appointed as confidential assistant or secretary by the Board.

2. Secretary-Treasurer is not authorized to appoint a confidential secretary who shall be within the "Unclassified Service" in the State Service.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 17, 1940, in which you request my opinion as follows:

"In re: Status of the Secretary-Treasurer, Teachers' Retirement System of Alabama, under provisions of the Merit Act as amended by S. B. No. 336.

"I should like to have your opinion concerning the status of the Secretary-Treasurer of the Teachers' Retirement System under the provisions of the Merit Act.

"QUESTIONS:

1. Are the duties of the Secretary-Treasurer of the Board of Control, as defined in the act, such as to confer upon said Secretary-Treasurer the status of an executive agent of a State Board?

"2. If you hold that the Secretary-Treasurer of the Board of Control is the executive agent of a State Board as defined in the amendment to the Merit Act, in supra, is said Secretary-Treasurer authorized to appoint a Confidential Secretary who shall be exempt from the provisions of the Merit Act?

"I shall appreciate an expression of your opinion in response to the above questions."

I assume from your inquiry that you desire to know whether or not (1) the Secretary-Treasurer of the Board of Control established under the Teachers' Retirement Act (Act No. 419, S. 362, approved September 15, 1939, General Acts, 1939, page 559) is subject to the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, page 68, as amended); and (2) whether or not under the provisions of the Merit System Act, supra, he is entitled to appoint a confidential secretary.

In answering your inquiry regarding whether or not the Secretary-Treasurer of the Board of Control would be subject to the Merit System Act, I assume that you refer to a person, not a member of the Board of Control, who has been appointed Secretary-Treasurer. Of course, if the Secretary-Treasurer were a member of the Board of Control he would come within the "Exempt Service" described in Subsection 4 of Subdivision (a) of Section 10 of the Merit System Act, as amended by Act No. 554, S. 366, approved September 19, 1939 (General Acts, 1939, page 876). It is my opinion that such a Secretary-Treasurer, not a member of the Board, would come within the "Classified Service" unless appointed a confidential assistant or secretary. This conclusion is based upon the clear and express language of Section 10 of the Merit System Act, as amended. This section, as you will see, provides that all officers and positions in the State Service, other than the Unclassified or Exempt Service, shall be included in the Classified Service. The Secretary-Treasurer would not come within the Exempt Service

since he is not included in any of the categories thereof. It cannot be said that he comes within Subsection 4 of Subdivision (a), as amended, *supra*, since he is not a member of a board or commission, nor the head of a department required by law to be appointed by the Governor, nor the head of a department required by law to be appointed by a board or commission with the approval of the Governor. He will not come within the Unclassified Service unless he is appointed a confidential assistant or secretary.

A reading of the Teachers' Retirement Act, *supra*, and particularly Section 6, leaves no doubt of the fact that the Secretary-Treasurer is in the "State Service." The fact that he performs certain executive or administrative duties of the Board which are passed along to him by the Board itself, cannot alter this conclusion.

While I have concluded that the Secretary-Treasurer of the Board of Control is not in the Exempt Service, it will probably be of help to you for me to briefly discuss the right of the State Board of Control and the Secretary-Treasurer to appoint a confidential secretary.

The State Board of Control undoubtedly has the right to appoint a single confidential assistant or secretary. This authority is given by Section 10(b)1 of the Merit System Act. Such an assistant or secretary so appointed falls into the Unclassified Service, which service, according to Section 10, is subject to the same rules and regulations of employment as apply to employees in the Classified Service except as to appointment and dismissal.

The Secretary-Treasurer of the Board of Control has no authority, in my opinion, to employ or appoint a confidential assistant or secretary under Section 10(b)1, which is as follows:

"The Unclassified Service shall include: One confidential assistant or secretary for each board, commission and elected officer. *** Employees in the Unclassified Service shall be subject to the same rules and regulations of employment as apply to employees in the Classified Service except as to appointment and dismissal."

It will be seen, therefore, that the only provision for confidential assistants or secretaries is that each board, commission or elected officer shall be entitled to one. The Board of Control, established under the Teachers' Retirement Act, *supra*, is, in my judgment, such a board as would be entitled to one confidential assistant or secretary.

It appears from Section 6 of the Teachers' Retirement Act that the Secretary-Treasurer is merely an appointee of the Board of Control and therefore could not be considered an "elected officer" within the meaning of Section 10(b)1. Even if it is argued that the Secretary-Treasurer is, in fact, "elected" by the Board, rather than "appointed," it is to be noted that this office has held that the words "elected officer" refers to officers elected by vote of the people and not by boards, etc. See opinion under date of December 22, 1939, to Hon. I. J. Browder, Director, Department of Personnel, Montgomery, Alabama, Quarterly Report of Attorney General, Volume XVII, page 401, in which it was held that the Clerk of the Supreme Court was not entitled to appoint a confidential assistant or secretary, it being there concluded:

"In my opinion, there is no room for the enlargement or extension of the term 'elected officer' as that term is used in the above quoted provision. It applies only to those officers elected, and in my judgment, an appointment by the judges of the Supreme Court is not parallel in effect to an election, as that term is used in the statute. It would appear that to determine the purpose of the proviso permitting elected officers to have a confidential assistant or secretary, it must be read in connection with the first part of Section 10, which defines the exempt service to include 'officers elected by vote of the people.'"

It may be noted in passing that while the Teachers' Retirement Act was approved on September 15, 1939, which date was subsequent to the date of the approval of the Merit System Act, i. e., March 2, 1939, a still later enactment, Act No. 552, S. 338, approved September 19, 1939 (General Acts, 1939, page 872), provides, as pertinent, as follows:

"Section 1. That all provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all of the State Officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding."

It will be seen that, by Act No. 552, the Merit System Act was brought forward to cover all legislation on the subject which had intervened between the date of its approval and September 19, 1939. Therefore, it would be applicable in all respects to the Teachers' Retirement Act. Cf. Quarterly Report of Attorney General, Volume XIX, page 80.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 26, 1940.

Hon. F. A. Flowers, Cashier,
Dothan Bank & Trust Company,
County Depository for Houston County,
Dothan, Alabama.

Mandamus Proceedings—

Where a right is sought to be enforced by mandamus, the party having an adverse judgment has thirty days in which to appeal. Failing so to do within the time prescribed by statute the judgment of the court becomes final and effective and parties interested in same may proceed in conformity with said judgment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 19, 1940, in which you request my opinion as follows:

"This bank is County Depository of Houston County, and as such has in charge the Fine and Forfeiture Fund of Houston County. There is registered in a proper book for such claims, in the name of C. J. Rollins who was formerly sheriff of Houston County, claims in the sum of \$210.50 and the certificates for these claims are in the hands of Blumberg & Sons, of this city. Mr. Rollins is now dead.

"Several years ago, when Mr. Rollins' books were checked by an Assistant Examiner of Public Accounts, we were advised by the Examiners and also by the then Comptroller, Mr. Charlie Lee, that Mr. Rollins was due considerable money to the Fine and Forfeiture Fund of Houston County on account of illegal withdrawals from the said fund, and that we should not, therefore, pay any further claims of Mr. Rollins on such fund until a full settlement should have been made between Mr. Rollins and the State.

"In recent months, Blumberg & Sons, of this city, made demand on us for payment of these claims in the sum of \$210.50 and we refused payment in accordance with letter of instructions from the Comptroller. Blumberg & Sons then brought mandamus proceedings against this bank to force payment, and on April 13, 1940, the petition for mandamus was denied by the Court, this action having been taken in Houston County Circuit Court before the Hon. D. C. Halstead, Judge of the Twentieth Judicial Circuit of Alabama.

"This bank is holding money in the Fine and Forfeiture Fund to pay the claims above mentioned, which are, of course, properly registered against such fund, and there are several thousand dollars registered against the fund for payment when money is available. Please advise me if I can now use the sum of \$210.50, which has been held subject to the above mentioned claims, for the payment of other registered claims which may be next in line for payment.

"There are also other claims registered in the name of C. J. Rollins in the sum of \$51.50 and payment has been refused on these claims on the same basis. Please advise if this bank should also release this amount for payment on other registered claims against this fund."

In answering your request I do so realizing that I am not fully informed just what questions were settled by the mandamus proceedings which were denied by the Court on April 13, 1940. I note you say that these proceedings were instituted by Blumberg & Sons against the Dothan Bank & Trust Company, as County Depository, so, I now presume that Blumberg & Sons brought these proceedings as the transferee of the claims from Rollins, the former sheriff, and that the pleadings in the case properly put in issue all the rights of the county as to its Fine and Forfeiture Fund, and that all the issues were squarely submitted to the court, and in its final judgment the court decided the issues adversely to the petitioner and no appeal was taken.

If I am right in the above presumption, the time for appeal has expired under Section 8980, Code of Alabama, 1928 (Michie). This section is as follows:

"Section 8980. Appeal to supreme court; a preferred case to be decided at first term—From the final judgment of any circuit court or other court exercising the jurisdiction of such court, in any such (mandamus) proceeding, an appeal shall lie to the supreme court as in other cases; but such appeal must be taken within thirty days after the final judgment is rendered, and shall be a preferred case in the supreme court, and shall be decided at the first term to which it is taken."

This being true, and an appeal not being prosecuted within the time prescribed by law, the judgment of the court becomes final and binding, and your bank, as County Depository, has the right to use this money in the payment of other claims now registered against this fund. **Donald v. Cotton States Tire Company**, 206 Ala. 88, 89 So. 296.

Now, as to the second claim belonging to the estate of C. J. Rollins of \$51.50, I am not, from the facts you give me, able to say just what the attitude of the bank should be. I would, however, suggest that the bank as county depository, refuse to pay this claim and force suit by the holder of the same, and, in this way, have an adjudication of the matter by the court.

Cf. opinion to Judge of Probate of Houston County, Alabama, on September 25, 1939 (Quarterly Report of Attorney General, Vol. XVI, page 279).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 29, 1940.

Hon. Thomas W. Coleman,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

County Offices—

No authority for opening or closing county offices, the opening and closing of which are regulated by statute, except in accordance therewith.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of July 20, 1940, in which you request my opinion as follows:

"It is reported that all of the offices in the courthouses in this section of the State are closing at least one afternoon a week, either Thursday afternoon or Saturday afternoon or both during the Summer months. The offices in this courthouse would like to close one afternoon a week, preferably Saturday afternoon, but I have been unable to find a law permitting it. Please advise if your office has rendered an opinion whereby it is possible to close this office and other offices whose opening and closing hours are regulated by Statute."

It is my opinion that there is no authority for closing the Probate Office or any other county office of Calhoun County, the opening and closing hours of which are regulated by statute, except in accordance with that statute. In an opinion of this office rendered to Hon. H. W. Clayton, Clerk of the Circuit Court, Marshall County, March 11, 1935 (Biennial Report of Attorney General, 1934-1936, page 99) it was said:

"I find no statute fixing the time you (Clerk of Circuit Court) are required to open and close your office. It is presumed that you will open at a reasonable hours in the morning and close likewise in the afternoon. I do notice, however, that there is a statute requiring the Judge of Probate to open his office at 9 o'clock A. M. and close it at 4 P. M. every day except Sunday. See Section 9577, Code of Alabama, 1923. * * *"

However, I call to your attention Act No. 404, H. 942, approved September 9, 1935 (General Acts of 1935, page 877), which is a general act of local application, permitting the county officers in counties of a population of not less than 60,000 nor more than 65,000 according to the last Federal census, to close their offices one afternoon a week, to be determined by the Board of Revenue of such county. This act is now applicable to the counties of Etowah, Tuscaloosa and Madison.

The county offices of Morgan County are authorized to close on Saturday afternoon, under authority of a local act. See opinion of Attorney General, Quarterly Report, Vol. XIV, page 110. Also the county offices of Lauderdale County are authorized to close one afternoon a week by Act No. 319, H. 776, approved September 1, 1939 (Local Acts of 1939, page 208).

Calhoun County has no such local act and other than the aforesaid acts, I find no authority allowing county offices whose opening and closing hours are regulated by statute to close one afternoon a week.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 29, 1940.

Hon. J. W. Sharpton, President,
Board of Revenue of Etowah County,
Gadsden, Alabama.

Codes — Statutes—

County Housing Authority Laws incorporated in the Code under a joint resolution of the Senate and the House sitting as a Committee of the Whole do not become laws until the effective date of said Code.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 20, 1940, in which you request my opinion as follows:

"Certain questions have arisen in connection with the creation of a Housing Commission for Etowah County by the Board of Revenue of said County, and we are writing to request your opinion on said matters.

"A petition has been filed with the Board of Revenue of Etowah County, signed by twenty-five, or more, residents of said County, setting forth that there is a need for a housing authority, or commission, in Etowah County. The Board of Revenue gave notice by publication in a newspaper published in Gadsden, Etowah County, Alabama, for at least ten days that a public hearing would be held on a stated date on said petition.

"On investigation, we are informed by our attorney that, according to his information, a joint resolution of the Senate and House, sitting as a Committee as a whole, was recently adopted, instructing the Code Committee to incorporate in the new code now being prepared the County Housing Authority Laws (please refer to Resolution No. 4 by Mr. Doughty). We have further been advised by our attorney that, in his opinion, the said County Housing Authority Laws, although incorporated in the New Code by the Code Committee, and under the direction of the resolution referred to, will not be in effect as a law of the State of Alabama until the Governor of our State issues a proclamation fixing, designating and appointing the date upon which the said New Code shall become operative, and our said attorney has therefore advised us, in his opinion, that there is now no existing law in the State of Alabama authorizing the creation of a Housing Commission. We, therefore, request you to give us answers to the following questions based upon the matters hereabove stated:

"1. Can the Board of Revenue of Etowah County legally create a Housing Commission under the provisions of the County Housing Authority Laws referred to above prior to the date that is fixed by the Governor in a proclamation for said New Code to become effective?"

I am of the opinion that your inquiry should be answered in the negative.

A joint resolution of the Senate and the House, sitting as a Committee of the Whole, instructed the Code Committee to incorporate into the Code, along with the present Housing Laws, County Housing Authority Laws so that the rural sections of the State may avail themselves of the moneys appropriated and allowed to the State of Alabama by the United States Administration (Resolution No. 4, by Mr. Doughty).

Section 2 of Act No. 629, H. 917, approved July 2, 1940, which was the act adopting a code of laws for the State of Alabama, provides as follows:

"Section 2. The Code of Alabama as herein adopted shall go into effect and be operative on the thirtieth day after the date of the Governor's proclamation announcing its publication, and shall govern completely, so far as a statute can, the subjects to which it relates; provided, however, that no statute enacted on or after the 25th day of June, 1940, shall be repealed or affected in any manner by the adoption of this Code."

A joint resolution, such as the one under consideration, instructing the Code Committee to incorporate into the Code certain laws does not have the effect of making said laws effective as of the date of the adoption of the resolution. Therefore, in my judgment, the County Housing Authority Laws, which are to be incorporated into the Code under the authority of Resolution No. 4, by Mr. Doughty, supra, will not become law until the effective date of the Code as provided in Section 2 of Act No. 628, supra.

There is at present no provision of law in Alabama providing for County Housing Authorities.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 29, 1940.

Hon. Roy D. McCord, Member,
House of Representatives,
Etowah County,
Gadsden, Alabama.

Registrars — Elections — Voters—

Board of Registrars of Etowah County—

When the Board must and may meet.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 25, 1940, in which you request my official opinion as follows:

"Several of the leading citizens of Gadsden, included among them are the members of the present Board of Registers of Etowah County, have asked me to ascertain whether or not the Board of Registers of Etowah County may meet at any time before the November general election for the purpose of registering new voters.

"There has been several hundred people to make inquiry to the Board of Registers within the last few days seeking to know when they can register.

"Is the Board of Registers of Etowah County, Alabama, permitted to meet and register voters at any time between now and the November 1940 general election? If so when can they meet and by virtue of what authority and how long can they meet and what steps do they have to take to legally meet?"

The exact question propounded in your inquiry has been ruled upon by this office in an opinion to Hon. John Dale Bonner, Chairman, Board of Registrars, Wilcox County, dated June 26, 1936, Biennial Report of Attorney General, 1934-1936, page 712, and it was held that the Board of Registrars must meet:

"Between October 1st and December 31, 1927, and each two years thereafter, to make a complete registration of all persons entitled to register. Time consumed by the Board in completing said registration shall not exceed thirty working days. (Section 375 of Act No. 289, S. 179, approved August 20, 1927, General Acts of 1927, page 274).

"On the fourth Monday in January, 1928, and each two years thereafter and remain in session ten working days for the purpose of registering voters. (See Act No. 289, supra.)

"On the first Monday in January, 1936, and each two years thereafter for the purpose of purging the list, and continue in session one week. One week is composed of six working days and Sunday.—See Quarterly Report of the Attorney General, Vol. II, p. 44. (Section 1 of Act No. 460, H. 926, approved September 13, 1935, General Acts 1935, p. 969.)

"On the second Monday in February, 1928, and each two years thereafter, and remain in session one day for the purpose of striking names from the registration list. (Section 393 of Act 289, S. 179, approved August 20, 1927, General Acts 1927, p. 276).

"On the first Monday in July, 1936, and each year thereafter, and remain in session for five days for the purpose of registering voters. (Section 1 of Act No. 155, H. 171, approved April 21, 1936, General Acts of 1936, Extra Session, p. 174).

"In my opinion the Board of Registrars of Wilcox County may meet when ordered by the court of county commissioners, board of revenue, county commissioners, or other court of like jurisdiction, for ten working days during the month of January, 1921, and each two years thereafter, for the purpose of registering voters. (Section 1 of No. 155., supra.)"

Boards of Registrars are required to meet and remain in session five days for registering voters in all counties of the State except Montgomery, Mobile, and Jefferson, on the first Monday in July of each year. Quarterly Report of Attorney General, Vol. III, page 180; Biennial Report of Attorney General, 1936-1938, page 627. Boards of Registers have no authority to hold a session other than those specifically granted by statute. Quarterly Report of Attorney General, Vol. XVIII, page 158.

The premises considered, it is my opinion that the Board of Registrars of Etowah County would have no authority to meet and register voters at any time between now and the November, 1940, general election.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 30, 1940.

Dr. Walter B. Jones, Director,
Department of Conservation,
Capitol.

Department of Conservation — Director — Salary — Expenses —

1. Salary of Director of Conservation payable from moneys in the Conservation Fund received from license fees paid by hunters and fishermen.

2. Expenses incurred by Director of Conservation which are incident to the operation of the Game, Fish and Seafoods Division, are payable from the moneys in the Conservation Fund received from license fees paid by hunters and fishermen.

3. Expenses incurred by the Director of Conservation, which are incident to the operation of one of the divisions of said Department, (excluding Game, Fish and Seafoods Division) are payable from the Conservation Fund.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for an official opinion, bearing date of July 17, 1940, is as follows:

"Re: Request for official opinion regarding the fund from which the salary and expenses of the Director of Conservation should be paid.

"On the 24th day of August, 1939, the Appropriation Act (No. 247-S. 239-Toomer) was approved by the Governor. Under the terms of said Act, VIII, Development and Conservation of Natural Resources, there is provided as follows:

"No. 1. — Department of Conservation. a. Game, Fish and Seafoods Division: For compensation of the Director of Conservation, for salaries and for other expenses incident to the operation of the Game, Fish and Seafoods Division, the moneys in the Conservation Fund received from license fees paid by hunters or fishermen.'

"This fund is known to this Department as the Game, Fish and Seafoods Fund.

"Subsequent to the passage of the Appropriation Act above cited, there was approved by the Governor on Sept. 21st, 1939, an Act to amend Section 17 of the Department of Conservation Act of 1939, approved March 13, 1939, which Act is No. 523-H. 689-Toomer. This Act provides as follows:

"'All salaries and other expenses of the Department of Conservation shall be paid from the Conservation Fund but only in the same manner as the salaries and expenses of other departments of the State are paid, and all expenditures from the Conservation Fund shall be subject to the provisions of any laws relating to the budgeting, control or allotment of appropriations and expenditures. Nothing in this Act, however, shall require or permit the diversion of license fees heretofore or hereafter to be paid by hunters or fishermen for any purpose other than the administration the Division of Game and Seafoods, and such fees shall be used solely for the purpose of such administration.'

"In your opinion should the salary and expenses of the Director of Conservation be paid from the Game, Fish and Seafoods Fund or the General Conservation Fund?"

In my opinion, your inquiry presents two questions; that is (1) from what fund is the salary of the Director of Conservation payable; and (2) from what fund or funds are the necessary expenses incurred by the Director of Conservation in the exercise of his official duties payable.

Answering question number one, I call attention to Section 17 of the Department of Conservation Act of 1939 (General Acts, 1939, page 255) as amended by Act No. 523, H. 689, approved September 21, 1939 (General Acts, 1939, page 814), which is as follows:

"Section 17. CONSOLIDATION OF FUNDS. The Game and Fish Fund, the Forestry Fund, the Oyster Protection Fund, any funds or moneys of the Alabama Oyster Commission or any corporation incorporated pursuant to said Alabama Oyster Commission Act (except such

funds or moneys as may have been heretofore specifically pledged and set aside for the payment of bonds issued heretofore) and all other funds and moneys (whether special or ear-marked or not) under the control or management of or used for or by any of the departments, boards, bureaus, commissions, agencies or offices of the State, the functions and duties of which have been transferred to and conferred upon the Department of Conservation by this Act, are hereby consolidated and combined into one fund, which shall be known as the Conservation Fund. All of such funds and moneys shall be transferred and delivered by the officers now having charge thereof to the State Treasurer forthwith. Each officer or employee charged with the duty of collecting any such funds or moneys shall remit all collections directly to the State Treasurer or deposit the same in a duly approved State depository to the credit of the Conservation Fund, as provided by law; and an additional duplicate deposit slip or receipt shall be furnished by the State Treasurer or such depository and forwarded to the Director of Conservation. All salaries and other expenses of the Department of Conservation shall be paid from the Conservation Fund but only in the same manner as the salaries and expenses of other departments of the State are paid, and all expenditures from the Conservation Fund shall be subject to the provisions of any law relating to the budgeting, control or allotment of appropriations and expenditures. Nothing in this Act, however, shall require or permit the diversion of license fees heretofore or hereafter to be paid by hunters or fishermen for any purpose other than the administration of the Division of Game and Fish and Seafoods and such fees shall be used solely for the purpose of such administration. Nothing in this Act shall require the diversion of any funds from any particular purpose if the effect of such diversion would penalize the State in retaining or securing any Federal funds or Federal assistance. Any unexpended balance remaining in the Conservation Fund at the end of any fiscal year (except license fees paid by hunters or fishermen) shall be transferred to the General Fund. Nothing in this Act, however, shall require or permit the diversion of either private, county, or Federal contributions for fire protection purposes; and there is hereby created in the State Treasury a special fund to be designated as the 'Forest Protection Fund.' The Director of Conservation and the State Forester shall deposit in the said Forest Protection Fund all private and county fire protection contributions and all Section 2 Clarke-McNary Law reimbursement funds paid by the Federal Government. All moneys deposited to the credit of this fund shall be held for the benefit of and for expenditure by the Division of Forestry in the Department of Conservation for forest fire protection purposes, and shall not be diverted to any other general or special fund." (Emphasis supplied)

It will be noted that under the provisions of the above section the Game and Fish Fund, together with other named funds and designated moneys under the control or management of or used for or by any other departments, boards, bureaus, commissions, agencies or offices of the State, the functions and duties of which were transferred to and conferred upon the Department of Conservation by Act No. 523, supra, were consolidated and combined into one fund to be known as the "Conservation Fund." Further, that from said Conservation Fund, all salaries and other expenses of the Department of Conservation are payable; with the proviso, however, that the license fees paid by the hunters and fishermen shall not be diverted but shall be expended solely for the administration of the Division of Game and Fish and Seafoods. This, therefore, makes the moneys received from license fees paid by hunters and fishermen a part of the Conservation Fund

but earmarked to be used solely for the purpose stated. At this point, I call attention to the fact that this proviso was also contained in said Section prior to its amendment.

Section VIII, subdivision (a) of the Appropriation Act (General Acts, 1939, page 411) makes the following provision:

"(a) Game, Fish and Seafoods Division: For compensation of the Director of Conservation, for salaries and for other expenses incident to the operation of the Game, Fish and Seafoods Division, the monies in the **Conservation Fund received from license fees paid by hunters or fishermen.**" (Emphasis supplied)

From the above, it will be seen that the compensation of the Director of Conservation was made payable from the moneys in the Conservation Fund received from license fees paid by hunters and fishermen. This act was passed subsequent to the Department of Conservation Act and, therefore, because the proviso found in Section 17, *supra*, was also contained in Section 17 of the original Act, it is my opinion that it was the intention of the Legislature that the salary of the Director of Conservation should continue to be payable from the money in the Conservation Fund received from license fees paid by hunters and fishermen.

Answering request number two, I again call attention to Section VIII, subdivision (a) of the Appropriation Act, *supra*. It will be noted that although it provides for the payment of the compensation of the Director of Conservation from the moneys in the Conservation Fund received from license fees paid by hunters and fishermen, yet the expenses which are payable from said fund are those incident to the operation of the Game and Fish and Seafoods Division. Therefore, it is my opinion that only those expenses incurred by the Director of Conservation which are incident to the operation of the Game and Fish and Seafoods Division are payable from the funds in the Conservation Fund received from license fees paid by hunters and fishermen. However, when expenses are incurred by the Director of Conservation which are incident to the operation of one of the other divisions of the said department, then the same are payable from the moneys in the Conservation Fund other than those derived from license fees paid by hunters and fishermen.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August, 1, 1940.

Hon. H. A. McDowell,
License Inspector,
Jefferson County,
Birmingham, Alabama.

The mere sawing of wooden slats to the proper lengths for the purpose of fitting them into venetian blinds is not the operation of a "mill or factory where lumber or timber is sawed or made into finished or semi-finished products" within the contemplation of said schedule.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of July 19, 1940, in which you request my opinion as follows:

"As License Inspector for Jefferson County, Alabama, I served notice on the Birmingham Awning & Tent Works to pay a license under Schedule 123½, provided in House Bill 182—McDermott, on pages 279 and 280, 1936, for the operation of a planing mill. The attorney representing the Birmingham Awning & Tent Works disagrees with me as to the liability of his client.

"Birmingham Awning & Tent Works operates a business of selling awnings, tents and venetian blinds; the venetian blinds are made up from assembled products, with nothing to do but saw wood slats to the length desired and put them together, for which purpose this concern operates a saw. The saw is used just to cut the finished product to desired length. Based upon these facts, the license inspector holds that they are liable for a license for operating a planing mill.

"The company takes the position that they are not liable for such license, or any other liability provided in Section 123½, and I will appreciate you giving me an opinion on this subject."

In my opinion, under the facts submitted by you, the Birmingham Awning & Tent Works is not liable for the payment of license tax levied by Schedule 123½, which was added to Section 348 of the Revenue Act of 1935 by Act No. 231, H. 182, approved March 2, 1937, General Acts, 1937, page 279. Said added schedule provides:

"Each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows: Where there are 5 or less men employed or so engaged—\$5.00. Where there are more than 5 men and less than 10 so employed or engaged—\$10.00. Where there are more than 10 men and less than 20 so employed or engaged—\$30.00. Where there are more than 20 men and less than 40 so employed or engaged—\$30.00. Where there are more than 40 men and over—\$120.00. It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Schedule 123 or under Schedule 84, then no privilege license shall be charged or collected hereunder."

The schedule purports to levy a tax upon persons, firms or corporations engaged in the operation of mills or factories where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill which is licensed under another schedule. From the facts submitted by you, all that the Birmingham Awning & Tent Works does is to saw wooden slats into the proper lengths desired by them in order to make venetian blinds. In my opinion, this is not an operation of a "mill or factory" as is contemplated by the schedule.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August, 1, 1940.

Hon. J. V. Hughes,
Tax Collector,
Lawrence County,
Courtland, Alabama.

Tax Collector — Rabies Inspector — Holding both offices at same time—

Persons holding the office of tax collector may not at the same time hold the office of Rabies Inspector.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of July 22, 1940, in which you request my opinion as follows:

"I would like to ask your opinion on this question, I was appointed Tax Collector of Lawrence County, on July 13th, and was at that time Rabies Inspector, and since my term does not expire until Jan. 1941, I wondered if I could continue to hold both places?"

I am of the opinion that your inquiry should be answered in the negative. That is to say, a person holding the office of Tax Collector cannot at the same time hold the office of Rabies Inspector.

Section 280 of the Constitution of Alabama, 1901, reads as follows:

"Section 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars; shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the

same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds." (See also Section 2575 of the Code of Alabama, 1923)

Therefrom it is seen that no person may hold two offices of profit at one and the same time. Your question then is whether or not the position of Tax Collector and the position of Rabies Inspector are "offices of profit" within the meaning of Section 280 of the Constitution.

There can be no question but that the position of Tax Collector is an "office of profit" within the meaning of Section 280 of the Constitution. See Biennial Report of the Attorney General, 1926-28, page 251.

In regard to the position of Rabies Inspector, we are presented with a more difficult question. In the case of *state ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211, Mr. Justice Brown, speaking for the Supreme Court in regard to the meaning of an "office of profit" said:

" * * * Any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state, the term and salary or perquisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280 of the Constitution of 1901. * * * "

From this statement of Mr. Justice Brown, it is seen that the salient features of an office of profit are: (1) that it carries as a necessary incident to its exercise some part of the sovereign power of the state; (2) that there be a definite term of office, and (3) that the salary or perquisites of the office be fixed by law.

The position of Rabies of Inspector was created by Act No. 200, So. 71, approved March 2, 1937 (General Acts of the Extra Session, 1936-37, page 230), and amended by Act No. 184, S. 92, approved March 17, 1939 (General Acts of 1939, page 329). Section 2 of this act reads:

"Section 2. That Section 2 of the Act which this Act is an amendment is hereby amended to read as follows: Section 2. ENFORCEMENT PROVISION. For the purpose of providing proper enforcement of the provisions of this Act, each County Board of Health is hereby invested with general supervisory powers; and it shall be its duty, with the approval of the State Health Officer and the State Veterinarian, to appoint, on the passage and approval of this Act, and annually thereafter within the first fifteen days of January, a competent veterinarian, or other person properly qualified, **who shall be known as Rabies Inspector, and whose term of office shall end on December 31 of the year of appointment**; provided however, that he shall be eligible for reappointment. Such inspector may select as many deputies to aid him in the enforcement of this Act as he may desire. It shall be the duty of the said Inspector, under the direction of the County Board of Health, to enforce the provisions of this Act, and it shall be his duty to inoculate dogs, or have the work done by his deputies; and, **for the full enforcement of the provisions of this Act, the said Rabies Inspector and his deputies are clothed with full police power**; and the sheriff and his deputies in each county and the police officers in each incorporated

municipality shall be aids, and are instructed to cooperate with said inspector in carrying out the provisions of this Act. **The compensation of the Inspector and his deputies shall be limited to the fees prescribed in succeeding sections of this Act.** The said Rabies Inspector may be removed from office, for cause, by the County Board of Health." (Emphasis supplied)

From this section it will be seen that the Rabies Inspector has a definite term of office.

Section 6 of the Rabies Act reads as follows:

"Section 6. FEES. It is hereby provided that the Rabies Inspector, or other person authorized to inoculate dogs against rabies, may charge for such services a sum not to exceed 50 cents for each dog treated for Rabies. The Rabies Inspector shall keep a record of all dogs inoculated on forms furnished by the State Board of Health."

It will be seen from this provision that the Rabies Inspector has definitely authorized compensation provided for him. It will be noted that Mr. Justice Brown in his opinion quoted above, states salary or perquisites which are fixed by law. A perquisite is a fee to an officer for a specific service in lieu of an annual salary (30 Cyc. 1525). Therefore, Section 6 specifically conforms to that requirement set out by Justice Brown.

If the office is created, the officer appointed, his power given, his duties defined, and his compensation fixed directly by an act of the Legislature, as in the situation here, he exercises a share of the civil government and his authority comes directly from the state. *Montgomery v. State ex rel. Enslen*, 107 Ala. 372, 18 So. 157. In addition, the enforcement provision, Section 2 set out above, clothes the Rabies Inspector with full police power in carrying out the provisions of the Rabies Act. Therefore, it is clear that the position carries as a necessary incident to its exercise some part of the sovereign power of the State.

The premises considered, it appears that the Rabies Inspector complies with each of the conditions incident to an "office of profit" set out in the *Wilkinson Case*, supra. Cf. Quarterly Report of Attorney General, Vol. XII, page 5; Biennial Report of Attorney General, 1928-30, page 385.

Therefore, it is my opinion that a person cannot hold the position of Tax Collector and the position of Rabies Inspector at the same time, since both are offices of profit within the meaning of Section 280 of the Constitution.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 10, 1940.

Hon. J. W. Heustess,
Clerk, Board of Revenue,
Montgomery County,
Montgomery, Alabama.

Counties — County Governing Bodies — American Road Builders' Association.

County governing body may by resolution authorize payment of annual dues in American Road Builders' Association.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of July 27, 1940 follows:

"Re: County Membership in the American Road-Builders' Association.

"The American Road-builders Association, with headquarters in Washington, D. C., is an organization which provides technical information and assistance to its members. This information provided covers every subject in which a County would be interested in relation to its road construction and reconstruction, and financing program for same. Information is also provided as to types of structures for drainage, bridges, etc., as well as information on machinery, equipment and products used in road work. Also, legal information as to the interpretation of National Legislation, is afforded.

"All the above information is provided to the County members of this organization without cost to them other than annual membership dues of \$25.00. The above information would be most valuable to the County, and therefore, the writer wishes to be advised if Montgomery County has the authority to join the above organization.

"Reference is made to your opinion under date of July 9, 1940, addressed to the Hon. T. C. Garner, Treasurer, Jefferson County, Birmingham, Alabama."

The opinion above referred to in the concluding paragraph of the request amply supports the conclusion that a county governing body may, by appropriate resolution, to be spread on the minutes of its meetings, authorize payment of annual membership dues in the American Road-builders' Association.

No valid distinction can be drawn as between membership in said association and membership in The Association of County Commissioners of Alabama. Apparently both associations have been organized and function to a common end, to-wit, for the promotion of efficient construction and maintenance of public roads and bridges. Whether their functions, objects or purposes overlap, it is unnecessary to consider.

By reason of its broad, comprehensive and original jurisdiction as to roads and bridges, a county governing body may adopt such measures as in its sound discretion contribute to the efficient maintenance or construction of roads and bridges. Its judgments and decrees in that regard can be assailed only for fraud or corruption.

Ensley Motor Car Co. v. O'Rear, Treas.,

196 Ala. 481, 71 So. 704.

Further comment or discussion would be superfluous.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 10, 1940.

Hon. H. Herbert Evans,
404-405 Wilson Bldg.,
Anniston, Alabama.

Deputy Solicitor — Reclassification — Deputy Solicitor of Calhoun County—

Deputy Solicitor of Calhoun County will not be entitled to increased compensation until sometime during the year 1943.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated July 30, 1940 follows:

"At the extra session of the Legislature, 1936-1937, (Acts 1936-1937, page 90), the Legislature passed an Act 'To fix the compensation of the Deputy Solicitor in all Counties of this State, which now have or which may hereafter have, a population of 60,000 or more according to the last or any subsequent federal census, and while such counties are embraced in judicial circuits having more than one county.' That Act was approved by the Governor on February 4 1937. Under the 1940 Federal Census (Which I presume is as yet unofficial), the population of Calhoun County is 63,276. Please give me an opinion as to whether or not my salary as Deputy Solicitor of Calhoun County will become under that Act \$1800.00 annually, as provided in said act. Please also give me your opinion as to when this salary increase would become effective."

In my opinion, you will not be entitled to the increased compensation as provided by Act No. 75 H. 127, approved February 4, 1937, General and Local Acts, Extra Session 1936-37, page 90, until sometime in 1943. Your compensation as deputy solicitor of Calhoun County is governed by Section 5523 of the 1923 Code of Alabama, which provides in part as follows:

"5523. Salary of deputy solicitors.—There shall be paid out of the county treasury, except as herein otherwise provided, to the deputy solicitor of the county, an annual salary, in equal monthly installments of twelve hundred dollars in all counties, which shall be in lieu of all fees or compensation allowed by law to such county solicitor, and the payment of said salary to be by warrant of the probate judge of the county drawn on the treasurer thereof."

Section 1 of Act No. 75. supra, provides as follows:

"Section 1. That the Deputy Solicitor in all Counties of this State, **which now have or which may hereafter have a population of 60,000 or more according to the last or any subsequent Federal Census** and while such Counties are embraced in Judicial Circuits having more than one County, shall receive an annual salary of \$1800.00 payable in the same manner as other Deputy Solicitors are paid." (Emphasis supplied).

Act No. 233, S. 221, approved August 16, 1939 (General Acts, 1939, p. 388) provides as follows:

"Section 1. That the ninetieth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

Constitutional Amendment No. 12, H. 22, passed by the Senate and House of Representatives as amended March 29, 1939 ratified July 21, 1939, provides in part as follows:

"* * * * "The Legislature shall convene on the second Tuesday in January succeeding their election and shall remain in session for not longer than ten consecutive calendar days. No business can be transacted at such sessions except the organization of the Legislature, the election of officers and the appointment of standing committees of the Senate and the House of Representatives for the ensuing four years.

* * *

"The Legislature shall convene in regular sessions on the first Tuesday in May of 1943 and on the first Tuesday in May in each second year thereafter, until the date of meeting shall have been changed by Act of the Legislature and approved by the Governors."

I understand that the 1940 Federal Census will not be published until next November. The reclassification date for Calhoun County, under Act

No. 75, supra, as provided by Act No. 233, supra, will be on the ninetieth day after the first day of the next regular session of the Alabama Legislature which will be held in 1943.

"Where a statute is plain and unambiguous, there is no room for construction." **Alabama-Southern Digest, Vol. 25, Statutes, Key No. 190,** and cases cited thereunder.

See also opinion of this office to Hon. B. G. Robison, Judge of Probate, Pickens County, Carrollton, Alabama, under date of July 12, 1940, copy of which is enclosed for your convenience.

The premises considered, it is therefore my opinion that you will not be entitled to your increased compensation until sometime during the year 1943. I understand that Act No. 233, supra, has not been brought forward in the new Code. If my information is correct, after the effective date of the new code, it may be necessary to reconsider this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 21, 1940.

Hon. Haygood Patterson, Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

Sales Tax — Farm Products — Flowers — Nursery Stock —

All farmer produced and sold fruits, vegetables, flowers, eggs, poultry, meat products, and jellies, when the same are offered for sale in the original state or in a condition of preparation for sale by the farmer, a member of his family or an employee regularly employed in the production of these products in and about the business of farming, as the term is commonly understood and accepted, are exempt from the provisions of Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16).

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 26, 1940, in which you request my opinion as follows:

"I am requesting your opinion as to what farm products sold from curb markets or way-side stands are exempt from sales tax. Heretofore all farmer produced fruits, vegetables, flowers, eggs, poultry, meat pro-

ducts, jellies, etc. have been considered as exempt. The State Tax Commission is now requiring a sales tax on some of the curb market sales.

"Will you please give me your opinion as to whether all farmer produced products are or are not exempt from the sales tax regulation."

In reply, I wish to refer you to Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16), Section V, Subsections (f) (as amended by General Acts, 1939, pp. 228, 529) and (h) of which provide as follows:

"Section V. EXEMPTIONS: There are however exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: * * * (f) The gross proceeds of sales of all livestock by whomsoever sold; and also the gross proceeds of sales of poultry and other products of the farm, dairy, grove or garden, when in the original state of production, or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof. Nothing herein shall be construed to exempt or exclude from the measure or computation of the tax levied, assessed or payable hereunder the gross proceeds of sales of poultry products when not products of the farm. * * * (h) The gross proceeds of the sale, or sales, of seeds for planting purposes. Nothing herein shall be construed to exempt, or exclude from the computation of the tax levied, assessed or payable, the gross proceeds of the sale, or sales, of plants, seedlings, nursery stock or floral products."

You will note that products of the farm, dairy or garden are exempt from the provisions of the above named Sales Tax Act when the same are in the original state of production or condition of preparation for sale, when such sale or sales are made by the producer, members of his family or an employee of the producer who is employed by him to assist in the production thereof.

In my judgment, the legislative intent to exempt all products produced and sold by the farmer or those employed by him in the production of the farm products is clearly exhibited in the exemption in the Sales Tax Act, quoted supra. You ask specifically whether or not certain products sold on the curb markets or wayside stands are exempt from Sales Tax. I assume that you mean that all of these products are farmer produced in the original state or in a condition of preparation for sale and are sold by the farmer, a member of his family or an employee engaged in the production of such products. With this assumption in mind, it is my opinion that farmer produced fruits, vegetables, eggs, poultry, meat products, jellies and other provisions for the mouth are farm products within the meaning of the exemption of the above quoted Sales Tax Act of 1939. A like construction was placed upon the words "farm products" in the case of *Keeney v. Besman*, 182 A. 566, 569, 169 Md. 582, 103 A. L. R. 1515, wherein the court defined farm products as follows:

"'Farm products' include swine, horses, meat cattle, sheep, manure, cordwood, hay, as well as vegetables, fruits, eggs, milk, butter, lard and other provisions for the mouth."

Cf. Words and Phrases, 5th Series, Vol. 2, page 934.

A similar definition of the words "farm products" is given in the case of **City of Philadelphia v. Davis** (Pa.), 6 Watts and S. 269, as follows:

"Swine, horses, meat cattle, sheep, cordwood, hay, as well as vegetables, fruit, eggs, milk, butter, lard, and other provisions for the mouth, are strictly 'products of the farm', much more so, indeed, than beef, which, though it comes like everything, primitively from the soil, is as much a manufactured article as leather, cloth, or charcoal."

Cf. Words and Phrases, 1st Series, Vol. 3, page 2699.

In my judgment, all the products named by you in your request, except flowers, would squarely meet the provisions of the above quoted definitions as well as the intention of the Legislature to exempt the products produced and sold by farmers.

The question of whether or not flowers are exempt under the provisions of the above quoted 1939 Sales Tax Act compels a consideration of Subsection (h) of the above quoted Sales Tax Act of 1939. In my judgment, the entire Section V of the 1939 Sales Tax Act must be construed as a whole to arrive at the legislative intent. When such construction is placed upon the exemptions contained in the named Sales Tax Act, it appears that when flowers, plants, seedlings and nursery stock are products of the farm generally, where such production is incidental to the general business of farming, as the term is commonly understood and accepted, they are clearly exempt from the provisions of the said Sales Tax Act.

While it is true that the general rule of statutory construction requires an exemption in a taxing statute to be construed in favor of the taxing authority and against the taxpayer (cf. **State v. Tuscaloosa Cottonseed Oil Co.**, 208 Ala. 610, 95 So. 52), nevertheless when Subsections (f) and (h) of the above quoted Section 5 of the 1939 Sales Tax are construed together, in my judgment, the legislative intent clearly appears to exempt any and all products which are products of the farm, dairy, grove or garden, and are farmer produced and offered for sale under the conditions set out in said Subsection (f) above quoted.

Premises considered, it is my opinion that all farmer produced and sold fruits, vegetables, flowers, eggs, poultry, meat products, and jellies, when the same are offered for sale in the original state or in a condition of preparation for sale by the farmer, a member of his family, or an employee regularly employed in the production of these products in and about the business of farming, as the term is commonly understood and accepted, are exempt from the provisions of Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 21, 1940.

Hon. C. C. McGraw, Comm'r.,
Commissioners Court, Bibb County,
Marvel, Alabama.

Constitutionality — Bibb County —

Bibb County Local Act regulating the purchase and use of road material and equipment in said County, is violative of Section 106 of the Constitution of 1901 in that it does not appear that the notice of intention to apply therefor stated the substance of the proposed law.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated July 27, 1940 follows:

"We, the Commissioners of Bibb County, feel that an Act passed by the Legislature of Alabama, House Bill H-401-Wood, Local Acts 1939—No. 220 page 124 is not clear. The Commissioners have been advised that there is some doubt as to its constitutionality; there is some question also as to the notice given before passage—only the Caption of the Bill having been shown in the Centerville Press. There is also a provision in Section Three of the Act that prohibits the use of any machinery or equipment for the maintenance of roads that is not owned by the County. By this provision, we are precluded from using any equipment owned by private contractors or owned by the State Highway Department.

"We will therefore appreciate your giving us a ruling:— (1) as to the Constitutionality of this Act:— (2) Clarify the question of notice to be given, — (3) whether or not it is mandatory upon the Commissioners to accept the **lowest** bid, even though it does not meet detail requirements and (4) whether or not the County can use material and equipment owned by the State or the State Highway Department; if any expense is incurred in this connection, whether the Treasurer could be authorized to pay for such expense."

In reply to your request, you are advised that in my opinion the local act to which you refer, said act being Act No. 220, H. 401, approved August 11, 1939, page 124 Local Acts 1939, is unconstitutional in that it violates Section 106 of the Constitution of 1901. This section reads in pertinent part as follows:

"No * * * local law shall be passed * * * unless notice of the intention to apply therefor shall have been published, without cost to the State, in the county or counties where the matter or thing to be affected may be situated, **which notice shall state the substance of the proposed law.** * * *"

The notice given of the intention to apply to the 1939 Session of the Legislature of Alabama for the passage of this local law was as follows:

"A NOTICE

"Notice is hereby given that application will be made to the 1939 Session of the Legislature of Alabama for the passage of a bill, in substance as follows:

"A BILL TO BE ENTITLED AN ACT

"To regulate the purchase of Road Material, Equipment and all other things necessary for the building, improvement and maintenance of public roads in Bibb County, and to provide further for such material, road equipment as shall be used for building, improving and maintaining the public roads in Bibb County."

The question now presents itself as to whether the above notice meets the requirements of publishing the "substance" of the proposed law as required by Section 106 of the Constitution.

The Supreme Court of this State has not hesitated to strike down a local act where the deficiency in the notice is such that the public immediately interested in the proposed legislation is likely to be misled or deceived, or are not sufficiently informed as to the substance of the Act, **Tucker v. State**, 221 Ala. 50, 145 So. 9; **Commissioners Court of Winston County v. State**, 224 Ala. 247, 139 So. 356; **Gray v. Johnson**, 235 Ala. 405, 179 So. 221.

My examination of this notice and the act passed in pursuance thereof impresses me with the thought that the case of **Commissioners Court of Winston County vs. State**, supra, cannot be distinguished, and that the act must fail. The notice above quoted appears to be merely an indication of what the law is about, rather than what the law is. In **Wallace vs. Board of Revenue of Jefferson County**, 140 Ala. 491, 37 So. 321, the distinction was noted between the "subject" of legislation to be shown in the title, and the "substance" of a local law to be given by publication. As noted by Mr. Justice Bouldin in the Winston County case, "The one must show what the law is about; the other what the law is, in substance."

A brief review of the substance of the act, as compared with the notice, will serve to make clearer the conclusion that such notice does not contain the substance.

The notice merely says that the act shall regulate the purchase and use of road material and equipment for the public roads of Bibb County.

It will be noted in Section 1 of said Act that no material or equipment in excess of \$100 shall be purchased by the Commissioners Court, unless the same has been advertised for the lowest bid for at least ten days by publishing a notice on the bulletin board at the courthouse, or by advertisement in a newspaper published in Bibb County.

It will be noted in Section 2 of said act that the Commissioners' Court must accept the lowest bid for such equipment, and that the person, firm or corporation offering for sale such equipment must have a regularly conducted business in Alabama, with either its headquarters or a branch establishment located within this State.

It will be noted in Section 3 of said act that no equipment shall be used for the maintenance, improvement or building of country roads, unless such equipment is owned by Bibb County.

It will be noted in Section 4 of said act that a member of the Commissioners' Court who violates any of the provisions of said act shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$10 nor more than \$100.

Certainly the provisions of Section 1, 2, 3 and 4 referred to hereinabove are matters of substance, and do not appear in the notice hereinabove quoted.

To again quote from the Winston County Case:

"It is not expected that the citizens affected by a local law shall go to Montgomery or take other steps to ascertain what the substance of the law is. This is the precise purpose of the public notice required by Section 106."

Premises considered, it is my opinion that the Act is unconstitutional.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 22, 1940.

Hon. J. O. Brooks, Chairman,
Board of Revenue and Control,
Conecuh County,
Evergreen, Alabama.

Motor Fuel — A county that purchases, stores, or withdraws from storage any motor fuel defined by Section 1 of Act No. 590, p. 232, approved June 27, 1940, to be used in any motor vehicle upon the highways of this state must pay the six cents per gallon excise tax levied by said Act.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 4, in which you request my official opinion as follows:

"1st.—Conecuh County, Ala., and its Board of Revenue and Control, understand that the State Department of Revenue has the right, power,

and discretion to impose or withhold the levy and collection of the 6c tax on diesel oil in Conecuh or elsewhere in the State.

"2nd.—That the State Department of Revenue, however, is not willing to exempt the collection of this tax in Conecuh County, Ala., without your approval.

"3rd.—Conecuh County, Ala., and its Board of Revenue and Control, request you to do what is necessary to exempt Conecuh County, Ala., from this 6c tax hereafter referred to. (a) Under General Act No. 465, approved June 27, 1940, it is provided:—"Section 1 of the Act provides and covers diesel oil, etc.; Defines the word 'person' to include counties and municipal corporations; defines distributor to be any person who engages in the sale or distribution of said motor fuel. Section 2 of the Act, levies 6c per gallon on such motor fuel and requires every distributor or storer selling the same for use for operation of motor vehicles upon the highways of this State. **THIS MEANS STATE HIGHWAYS.** Section 4 provides that it shall be unlawful for any person to use motor vehicles on the highways of the State unless this tax is paid; Section 3 provides that persons storing or distributing such fuel for use in the operation of motor vehicles on the Highways of this State; **BUT DOES NOT PROHIBIT USE OF SAID FUEL in motor vehicles using the COUNTY ROADS.** Section 13 of the Act requires the tax to be paid to the State Treasury for use of the State Highway Department; Section 21 provides that the Act becomes effective on August 1, 1940."

"(b) Our county contends that so long as said fuel is used in motor vehicles on the roads of Conecuh County, the tax need not be paid, and we are requesting the Attorney General to so rule."

The Act to which you refer is Act No. 590, H. No. 392, approved June 27, 1940. This Act regulates the sale, distribution, storage and withdrawal from storage of certain motor fuels defined therein (including diesel oil) used in the operation of any motor vehicle upon the public highways of the state.

In my opinion, the terms "public highways of this State" and "highways of this State" are broad descriptive expressions which include all public highways, whether county, state or federal. In this connection I call your attention to that case of *Sexton v. State*, 196 So. 746, wherein the Supreme Court, speaking through Justice Knight, spoke as follows on the question of highways:

" * * * we do not approve what is said in the opinion of the Court of Appeals with reference to there being a difference in legal meaning between a 'highway' and a 'public highway.' The distinction attempted to be pointed out by the Court of Appeals between a 'highway' and a 'public highway' does not exist. 'The term 'highway' is the generic term for all kinds of public ways * * *, and the phrase 'public highway' is a tautological expression, since all highways are necessarily public.' *State v. District Court of Fourteenth Judicial Dist. in and for Broadwater County*, 80 Mont. 228, 260 P. 134, 135; *Omaha & Council Bluffs St. Ry. Co. v. City of Omaha*, 114 Neb. 483, 208 N. W. 123; *Canard v. State*, 174 Ark. 918, 298 S. W. 24; *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508; *New Deemer Mfg. Co. v. Kilpatrick*, 129 Miss. 268, 92 So. 71; *Schlesinger v. City of Atlanta*, 161 Ga. 148, 129 S. E. 861."

I now call your attention to Section 2 of the 1940 Act, which is as follows:

"Section 2. Every distributor or storer as herein defined of motor fuel as herein defined for the operation of motor vehicles upon the highways of this State shall pay, except as herein otherwise provided, an excise tax of six cents (6c) per gallon upon the selling, distributing, storing or withdrawing from storage, in this State, of any such motor fuel; provided, however, that where the excise tax herein levied shall have been paid by one distributor or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once."

This section levies an excise tax of six cents per gallon upon the selling, distributing, storage or withdrawal from storage, in this state, of any motor fuels as defined in the Act.

Section 3 of said Act, *supra*, is as follows:

"Section 3. The excise tax imposed by Section 2 hereof shall apply to persons defined in this Act storing motor fuels as herein defined or distributing same for use in the operation of motor vehicles on the highways of this State or allowing same to be withdrawn from storage for sale for use in the operation of motor vehicles on such highways; provided that distributors of motor fuels as herein defined paying the tax herein levied may pay the same as hereinafter required on the basis of their sales and storers shall pay the tax computed on the basis of their withdrawals from storage provided such sales or withdrawals from storage are for the purpose of operating motor vehicles over the highways of this State. Withdrawals for sale in or delivery into another State and sales to the United States shall not constitute taxable transactions under the provisions of this Act nor shall transfer of motor fuels as herein defined from one place of storage to another be considered withdrawal from storage as the term is herein used."

Section 10 of the 1940 Act, *supra*, provides in pertinent part as follows:

" * * * said Department of Revenue may issue to applicants therefor permits to purchase, store or use motor fuel as herein defined for purposes other than the operation of motor vehicles on the highways of the state without liability for tax levied in Section 2 hereof. * * * "

The above, in my judgment, does not apply to motor fuels, as defined in the act, when used in the operation of motor vehicles on a county road or highway as the term "highway" or "public highway of the State" includes county roads or highways. *Sexton v. State, supra*.

Therefore, I am of the opinion that if Conecuh County purchases, stores or withdraws from storage such motor fuel to be used in any motor vehicle on any highway of this state, whether it be a county, state, or federal highway, it must pay the excise tax of six cents per gallon.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Hon. W. L. Brown,
President, Board of Revenue,
Shelby County,
Columbiana, Alabama.

Elections — Code of 1923, Section 440 —

Member of appointing board serving instead of probate judge, who was disqualified under Section 439 of the Code of 1923, held entitled to be paid \$4.00 for service so rendered by the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 19, 1940, in which you request my opinion as follows:

"We have been presented with a bill for \$4.00 for services rendered as member of Appointing Board under Section 440 of the Code of 1923. Under the above quoted section of the Code this member served instead of the Probate Judge, who was disqualified under section 439 of the Code of 1923. Is the above charge a legal charge against the county?"

In reply, I wish to set out Section 440 of the Code of Alabama, 1923, which provides as follows:

"440. Place on appointing board; how supplied.—Upon receiving the certificate provided for in the preceding section, the register of the circuit court or such clerk shall forthwith and without delay appoint a qualified elector to take the place of each member of the appointing board who is a candidate for election, and shall cause the elector so appointed to be informed of his appointment; but no person shall be appointed who is a candidate for any office to be voted for in that election. Any person serving as a member of the appointing board shall receive four dollars for such services. The person so appointed shall perform all the duties and be vested with all the powers of the regular members of the appointing board and shall take an oath to faithfully perform his duties."

You will note that Section 440 authorizes the member of the appointing board appointed as a substitute for the probate judge, who was disqualified under Section 439 of the Code of 1923, to charge \$4.00 for the services rendered as a member of the appointing board.

I wish to refer you to the Primary Election Law of 1931 (Act No. 56, H. 73, approved February 25, 1931, General Acts, 1931, page 73) (as amended, but amendment not here applicable), Section 7 of which provides as follows:

"Section 7. That the officers and other expenses of any and all primary elections, general or special, held under the provisions of this

Act shall be paid for in the same manner and to the same extent as is or may be provided by law for the payment of the expenses and offices of general elections held under the general election laws of Alabama, and to be paid out of the county treasury in the same manner; provided, however, that the cost of such primary elections held for municipalities or for the elections of municipal officers or officials shall be paid for out of the treasury of such municipality."

I wish to call your particular attention to the fact that the above quoted statute provides that officers and other expenses shall be paid from the funds in the county treasury, except, of course, when the primary elections are held for municipalities, in which instance they shall be paid by the municipalities. In my judgment, this provision of law specifically provides for the payment of the officers appointed by the appointing board to hold the election, and under the provision "other expenses", as set out in the above quoted act, the member of the appointing board who serves as a substitute for a probate judge who was disqualified is entitled to collect from the county \$4.00 for the service so rendered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Hon. F. B. Carpenter,
Clerk and Register of Circuit Court,
Clay County,
Ashland, Alabama.

Costs and fees — Convict Department — Two Convictions.

Where person is convicted of two separate and distinct crimes and is sentenced to the penitentiary in both cases and is turned over to the penitentiary officials, and escapes before the completion of the sentence in the first case, the costs in both cases are payable by the Convict Department upon delivery of such person to the penitentiary officials.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated August 2, 1940 follows:

"On February 20th 1933 Sam Lamberth was convicted in the Circuit Court of Clay County for violating the Prohibition Law in Case No. 188 and was sentenced to Hard Labor for the County for 163 days for fine and cost.

"On February 25, 1933 the same defendant was convicted in the Circuit Court of Clay County in Case No. 216 for robbery and was sentenced to 10 years imprisonment in the penitentiary, said sentence to begin at the expiration of sentence in case No. 188. On the same day that he was convicted in Case No. 216 the defendant gave notice of appeal and on March 6, 1933 the defendant dismissed his appeal.

"Upon the conviction of the defendant in case No. 188 the defendant entered the State prison. Prior to the expiration of his sentence in that case he escaped. At the time he escaped a notation appeared on the records of the Convict Department that he was to be held for the State. No other record has been found in that department concerning the conviction in Case No. 216. However I have a copy of a letter written by the former Clerk of this Court under date of September 14, 1933 to the Convict Department in which it is stated that a copy of the Minutes of the Case No. 216 State vs. Sam Lamberth was enclosed.

"Cost in the amount of \$100.55 is due by the State to the officers and witnesses in Case No. 216 in connection with the conviction in the case, none of which has been paid by the State.

"The Questions are:—

"1st. Can the State pay the costs in case No. 216 under the above circumstances.

"2nd. If not can the costs in case No. 216 be charged to said case No. 188, since the defendant was in prison under conviction from case No. 188 at the time he escaped.

"3rd. If the cost in case No. 216 can not be paid by the State under either of the above alternatives can it be paid by the State, if so what steps are necessary to properly present the claim."

My answer to your first inquiry is in the affirmative.

Your attention is called to Section 3670 of the Code of 1923 which reads as follows:

"3670. After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the president of the board or the officer discharging his duties, who shall carefully examine the same, and if found correct, he shall request the state auditor in writing to draw his warrant upon the state treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials." (Emphasis ours)

It will be noted from the underscored portion of the above quoted code section, that when a person is delivered to the convict officials where he has been sentenced in two cases, the costs in the second case, provided for in Section 3667 of the Code of 1923, are payable by the Convict Department upon the delivery of such person to the penitentiary officials.

In my opinion, the fact that the convict in question escaped prior to the time he started serving on his second sentence would not alter or affect the express provisions of Section 3670, *supra*. **Biennial Report, Attorney General, 1934-36, page 663; Biennial Report, Attorney General, 1936-38, page 654.**

Since my answer to your first question is in the affirmative, this renders an answer to your second and third questions unnecessary.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Hon. Roy Mayhall, Member,
House of Representatives,
Winston County,
Haleyville, Alabama.

Municipalities — Elections —

Act No. 644, S. 363, approved July 10, 1940, which amends Section 1883 of the 1923 Code of Alabama, as to municipalities which have a population of 1,000 or more inhabitants, discussed generally.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 20, 1940, in which you request my opinion as follows:

"As Representative from Winston County, I would like for you to render an opinion for me on Senate Bill No. 363 by Mr. Conway, being Act No. 644, which act amends Code Section 1883 of the 1923 Code relative to City elections.

"I would like for you to give me your opinion on the following point: The Bill provides in case of a run-off that the Governing body of the City shall issue a call for said run-off election, to be called not later than 15 days after such election, and said second election shall be held not later than twenty days from the first.

"Question 1. In your opinion how early after the first election could the second election be held; could the same be called and held within a period of ten days or two weeks?

"Question 2. In case there are five offices to be filled, and more than ten candidates qualify for said offices, how will city governing authorities determine whether or not any candidate received a majority of the votes cast in said election?

"Question 3: If there is not more than one person of the same name qualifying for office of Alderman, is it necessary that the governing authorities designate the office to be filled by number?

"Question 4: If in any event it is necessary to designate the offices by number, and some members of the City Council have served more than one term consecutively, and the other members have served one term in office, and said members are all candidates for reelection, please advise how said offices will be so designated.

"Question 5: Do the terms of this Act in any way change the time of the city elections, or the time that the newly elected officers shall take office, in case the full time permitted by the Act was used by the city authorities in calling the second or run-off election. The city elections are to be held the 3rd Monday in September, and the newly elected officials under the law take office on the first Monday in October. This is less than twenty days from the time of the first election."

"Question 6: Where candidates for municipal office were qualified before the passage of the Conway Act, as is required by the statute considered in your opinion reported in Biennial Report of Attorney General, 1934-36, page 765, what procedure should be followed?"

I am taking the liberty of including in this opinion answers to certain other requests concerning the procedure to be followed under the Conway Act in order that the city officials affected may have the complete picture in one opinion.

The Conway Act, Act No. 644, S. 363, approved July 10, 1940, amends Section 1883 of the 1923 Code by providing a different method of election procedure in municipalities which have a population of 1,000 or more inhabitants. Haleyville has, by the 1930 Federal census, a population of more than 1,000 inhabitants. Therefore, my answers to the questions under consideration are applicable only to municipalities which had a population of 1,000 or more inhabitants according to the last (1930) Federal census. Cf. Quarterly Report of the Attorney General, Vol. XIX, pages 278, 282; Act. No. 233, S. 221, approved August 16, 1939 (General Acts, 1939, p. 388).

It may be well to state at the outset of this opinion that the Conway Act, while attempting to set up a **complete** procedure for the holding of run-off elections for certain municipal officers, fails in certain very pertinent aspects, which will be hereinafter noted, to accomplish its purpose. To act, therefore, must be considered primarily in the light of the end sought to be considered by the Legislature, i. e., to provide for a run-off election for municipal officials, in those cases where no candidate receives a majority of all

the votes cast in an election for any one office or offices for the election to which there were more than two candidates—rather than the means employed to accomplish such end.

All of the amendatory provisions of the statute must be considered in the light of the fact that they were inserted by the Legislature in an effort to provide the machinery for accomplishing this purpose, and such provisions must be broadly interpreted in order to give the effect which the statute-maker intended, for "the intent of the lawmaker is the law." **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 537, 51 So. 159.

It has been repeatedly held by the courts that when the meaning of the language and intent of the lawmaker is not obvious or certain it is necessary that interpretation be resorted to clarify the situation. As stated in the **Southern Express Company** case, *supra*, "Where the meaning of the language used, or the intent of the lawmaker, rests in inference, then construction and interpretation are useful."

It is further stated in the **Southern Express Company** case that "If the meaning or the intent is obvious and clearly expressed, then it does not rest in inference. The clearly expressed meaning or intent must and should prevail, though others could be assigned. If one meaning be certainly expressed, and another left to inference, the one expressed should prevail." Mr. Justice Mayfield, in speaking for the court, however, makes the following observation which is here particularly pertinent:

"This rule of construction does not imply that the letter shall control the spirit. A thing may be within the letter of a statute and not within the meaning or spirit, or it may be within the clear meaning or spirit and not within the letter. Courts, in construing statutes, often look less to the letter than to the context, the spirit, or to the meaning of the statutes to arrive at the true intent of the lawmaker. Statutes are often drawn inartificially. Apt words are not always used, and perspicuity and precision are not always observed by those who draft statutes. The whole statute under construction, as well as others, must sometimes be looked to, to ascertain the true meaning and intent." (Emphasis supplied)

It may well be said for this statute that "perspicuity and precision" were not observed in its drafting. However, that may be, when the legislative intent is determined and the end to be accomplished seen, a field of operation may be found for the statute.

Repeal by implication is not favored and it is only when two laws are so repugnant to or in conflict with each other that it must be presumed that it was the legislative intent that the latter should repeal the former. As stated in **Riggs v. Brewer**, 64 Ala. 282:

"This is never the case if there be a reasonable field of operation, by a just construction, for both; for then they will both be given effect. This is preferable to repeal by implication."

Each statute which constitutes a part of a system of laws should, if practicable, be so construed as to make the system consistent in all its parts; each is thus considered a part of the whole. **City of Birmingham v. Southern Express Co.**, *supra*.

With these rules in mind, let us proceed to a consideration of the Conway Act and the other statutory provisions which control the holding of municipal elections, and particularly those sections which prescribe the time in which certain essential acts connected with the holding of an election must be performed.

Section 1754 of the 1923 Code (as amended by Act No. 516, H. 613, approved September 14, 1935, General Acts, 1935, page 1105) provides for the holding of regular municipal elections quadrennially "on the 3rd Monday in September".

By Section 1880 it is required that the mayor or clerk shall give "at least ten days' notice" by publication or posting. These provisions would, of course, be applicable to the run-off election.

It is to be remembered, also, that the council, or other city governing body, is given "three days after the delivery of the boxes" to open the same and canvass the returns. (Sec. 1883, *supra*).

Account must also be taken of the absentee voter who, by Section 408, as pro tanto amended by Act No. 178, S. 27., approved April 19, 1933, General Acts, 1933, page 193, is given not more than thirty nor less than five days before the election in which to make application to the mayor, or clerk, as the case may be, for his ballots.

What then is to be our solution?

The Conway Act provides that the run-off election shall be called "not later than fifteen days" after the first election, such run-off election "to be held not later than twenty days" after such first election.

In considering these provisions it should also be remembered that by Section 1754, as amended, *supra*, "municipal officers elected at such elections shall assume the duties of their respective offices on the first Monday in October following such election, unless herein otherwise provided."

It is obvious that if the full time allowed by the Conway Act is permitted to pass before the run-off election is held, i. e., twenty days, those officers elected at such run-off election cannot take office at the same time as those elected in the first election. Similarly, if the Conway Act is followed literally and a run-off election ordered three days after the first election, which would be "not later than fifteen days after the first election", the ten-day notice provision of Section 1880 would be avoided. Likewise, those entitled to absentee ballots would be deprived of their opportunity of demanding the same.

While the Act purports to repeal all laws in conflict with it, an attempt must be made, in the light of the accepted rules of statutory construction hereinabove stated, to find some field of operation for all applicable statutes and to so construe the Conway Act as to permit it a field of operation without unnecessary conflict.

This office has heretofore ruled that where candidates are nominated for municipal office by petition of electors, the petition should be filed and the

candidate should file his declaration of candidacy prior to the first Tuesday in May in the year in which a State primary election is held. **Biennial Report of Attorney General, 1934-36**, pages 765, 768. It was noted, however, in the opinion that the failure of a candidate for municipal office nominated by petition to comply with the provisions of the act requiring the filing of such certificate would not keep the proper official from causing his name to be printed on the ballot to be used in the municipal election in which he is a candidate. So, it is apparent that while the Conway Act provides that "when-ever and wherever two or more candidates for municipal offices of the same name (constituting a group) are to be elected, each of the said places to be filled shall be designated by number by the council, and each candidate for such offices in the announcement of his candidacy shall designate the number of the office for which he is a candidate," the Act, being approved as it was on July 10, 1940, and effective as of that date, should be considered in the light of the fact that those candidates who filed their declarations of candidacy before the May primary could not possibly have complied with its provisions for the reason that the various offices had not been numbered at that time. The Legislature evidently contemplated that, under the construction given the statutes by this office, suitable provision could be made, prior to the date of the election, by the governing bodies of the municipalities concerned, for the designation by number of the offices sought and the requirement that the candidates declare their intentions as to the particular office for which they were candidates.

With these facts and principles in mind, it would seem that the following procedure, if adopted, would permit each of the statutes, above considered, a field of operation:

1. The city governing body in those municipalities where two or more candidates for municipal offices of the same name (constituting a group) are to be elected should, at the earliest possible date, call a special meeting, designate the offices by number in accordance with the provisions of the statute, and advise those candidates who have already filed their declarations of candidacy that it will be necessary for each of them to designate the number of the office for which he is a candidate. The council, or other governing body, should give publicity to this order so that other possible candidates may comply with this rule.

Of course, in those municipalities which are divided into wards, or in those municipalities which elect one member of the municipal governing body each year, or in those municipalities where another procedure is followed than by electing several members of the governing body as a group, it would not be necessary to follow this procedure, for the manner of determining the candidates who must go into a run-off is, in such instances, easily ascertained.

2. After the candidates have qualified and the general election is held, the council, or other city governing body, should immediately proceed to canvass the votes, and as soon as it has been determined that a run-off will be necessary, the council or other governing body should call an election for such purpose, to be held **not sooner than ten days** after such call (the ten days' notice should be given during this time), nor later than twenty days thereafter (this would follow the directions of the Conway Act and would permit absentee voters ample time to procure ballots, as well as give a candidate who determines not to enter the run-off election ample time to notify the council or other governing body of his intention not to enter such run-off election).

Those officers elected in the first election, i. e., those for whom no run-off is necessary, should be installed on the first Monday in October, as provided by Section 1754, as amended, supra. If the run-off election be completed and the results ascertained prior to the first Monday in October, then the officers so elected should take office on such date.

Those officers elected at the run-off election — if such run-off be not completed prior to the first Monday in October — would take office as soon as elected and qualified. The incumbents would, of course, remain in office until these run-off candidates were elected and qualified, for in Section 1886 of the Code of 1923 it is provided:

"If the election heretofore provided for (by Section 1754) should not take place on the day appointed, the corporation shall not for that cause be dissolved, but the incumbents shall remain in office until their successors shall be elected and qualified. * * *"

This section was the subject of discussion in *Rainwater v. State*, 237 Ala. 482, 187 So. 484, wherein it was also determined by the court that the statutes relating to municipal elections should be construed together to determine legislative intent.

While what has been hereinabove said applies generally to your inquiry, your specific questions should be answered as follows:

1. The pertinent portion of the Conway Act applicable to your first inquiry is as follows:

"If no candidate receives a majority of all the votes cast in such election for any one office or offices for the election to which there were more than two candidates, then, in such event, the council or other city governing body shall, not later than fifteen days after such election, order a new election to be held not later than twenty days after such election, at which election the two candidates receiving the highest number of votes in the first election for such office or offices shall run and the person receiving the highest number of votes shall be declared elected."

The foregoing provision must be considered in the light of my suggestions hereinabove noted and you are advised that while there are no limitations in this statute as to how soon after the election the run-off may be held, as stated above, the city governing body should not hold the run-off so soon after the general election as to preclude the giving of the statutory ten-day notice.

2. In regard to your second question, I call your attention to the following portion of the act in question:

"Provided that whenever and wherever two or more candidates for municipal offices of the same name (constituting a group) are to be elected, each of said places to be filled shall be designated by number by the council, and each candidate for such offices in the announcement of his candidacy shall designate the number of the office for which he is a candidate. The same person shall not be a candidate or permitted

to file his declaration for more than one of such places, and should a run-off be necessary, such candidate may enter the election for only the place for which he announced in his original declaration, and no ballot shall be counted for any candidate in any election, whether original or a run-off, except for the place and number for which he announced in his declaration filed with the legally constituted authorities to receive and file declaration of candidacy."

You will notice from the above quoted portion of the act the requirement that each of the offices be numbered and that a candidate in the announcement of his candidacy shall designate the number of the office for which he is a candidate. For instance, if four people are candidates for Alderman No. 1 and one of these candidates receives a majority of the number of votes cast for Alderman No. 1, then he is elected. If none of these candidates receives a majority of the number of votes cast for the office of Alderman No. 1, then it would be necessary to have a run-off between the two receiving the highest number of votes for the position of Alderman No. 1. and so on.

3. I assume that your third question arises from the following portion of the act:

"Provided that whenever and wherever two or more candidates for municipal offices of the same name (constituting a group) are to be elected, each of said places to be filled shall be designated by number by the council, etc.) * * *"

It is my opinion that the phrase, "of the same name", has reference to the office to be filled rather than the name of the candidate. For instance, this situation is brought about when five aldermen are to be elected. Therefore, the candidates having the same name would not affect the necessity of the governing authorities designating the office by number.

4. In answering your fourth question, I call your attention to the following portion of the act in question:

"Each of said places to be filled shall be designated by number according to seniority in service of the existing incumbents. If there is no such seniority, they shall be numbered in alphabetical order of the names of the incumbents."

It is my opinion that in so far as possible the offices shall be numbered in accordance with the seniority of the present incumbents; however, where several members have served for the same length of time, it would be necessary that their offices be numbered in the alphabetical order of their last names. For example, if Brown and Jones have served three consecutive terms, Dawson and Co'e have served two consecutive terms, and Monroe has served only one term, the offices would be listed as follows: 1.—Brown, 2.—Jones, 3.—Cole, 4.—Dawson, 5.—Monroe.

Your sixth inquiry has been answered in the course of this discussion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Mrs. Marie Bankhead Owen, Director,
Department of Archives and History,
Capitol.

Archives & History—Officials Sections 1408, 2692, and 10127, Code of 1923. State and County officials are authorized to turn over to Department of Archives & History for permanent preservation all papers and documents not in current use, except records in the office of the Circuit Clerk and records or papers of any court.

Opinion by Assistant Attorney General McCall.

Dear Madam:

I have your letter of July 16, 1940, in which you request my opinion as follows:

"I should like to know whether or not state, county and other officials have a legal right to transfer to the Department of Archives and History for preservation any original papers, documents, printed books newspaper files, and miscellaneous materials not in current use, as authorized by Section 1406 of the Code of 1923.

"The original papers and documents of counties, which are usually found in the storage room of the judge of probate, include estate case papers adoption and apprenticeship proceedings, records pertaining to the issuance of marriage licenses, and juvenile court proceedings; the clerk of the circuit court has custody of case papers of defunct courts as well as the courts in existence today; and the register for the circuit court in equity is custodian of a great many cases in localities where this official is separate and distinct from the clerk of the circuit court. Printed books consist of obsolete publications, privately owned books which have been left in the offices through the year, books in excess of the needs of the officials, and miscellaneous printed and near-print matter which have been accumulating in the offices during the past for various reasons. The newspaper files are the duplicate sets which are to be found in most of the county courthouses. Miscellaneous materials include such items as deeds which were left by the owner to be recorded but never called for; minutes and other items concerning the actions of the governing board of counties, under various names, which will never be used again for official purposes; old school census reports and other officials which are non-current or fall under the category of being destroyed periodically; and a number of other items which vary in the different sections of the state.

"It has been found that most if not all counties have transferred their original papers and documents into bound volumes. After transcribing these original papers and documents, most of the officials have stored them in any available space and are now using the transcriptions entirely. Secondly, there are quite a large number of books in some offices or store rooms which are not needed in the current operation of the several offices. The transfer of these books to the Department of Archives and History will not only relieve congested storage conditions

to some degree but will probably enable us to fill gaps in our Alabama Collection and acquire the needed duplicate volumes. In the third place, the newspaper files in the counties include a set in custody of the judge of probate, clerk of the circuit court, and, in some instances, the register for the circuit court in equity. We should like for the county officials to turn over to the Department of Archives and History all but one set of their newspaper files. Finally, the policy with regard to handling miscellaneous materials vary greatly with the various subdivisions of the state. Under miscellaneous materials, we should like to include the non-current materia's of municipalities as well as other public officials which will never be used for official purposes again.

"Should officials transfer their original papers, documents, newspaper files and miscellaneous materials to the Department of Archives and History they will be permanently preserved in the new fireproof building which was designed for this purpose. If the transcriptions or duplicates should ever be destroyed the official's will have access to the copies transferred to the Department of Archives and History. In addition, Section 1407 of the Code of 1923 provides that 'when books or records have been surrendered in accordance with the foregoing section, copies therefrom shall be made and certified by the director upon the application of any person interested, which certificate shall have all the force and effect as if made by the officer originally in the custody of them, and for which the same fees shall be charged, to be collected in advance.'

"I respectfully request you to review your opinion, which was given to Mr. William A. Conrad of Mobile on April 27, 1940, in the light of the information given above. Mr. McCall wrote the opinion of April 27, and I have discussed this review with him."

I call your attention to Sections 1406, 2692 and 10127 of the Code of Alabama, 1923, which read as follows:

"Section 1406.—Authority of officials.—Any State, county, or other official may, in his discretion, turn over to the department for permanent preservation therein any official books, records, documents, original papers, newspaper files, and printed books not in current use in their offices."

"Section 2692.—Closed books of officers; to whom delivered.—All public officers and servants of the state whenever any book, paper or document pertaining to the affairs, business or transactions of their office, has ceased to be current, shall deliver the same together with a list of such books, papers and documents, to the director of the department of archives and history, receiving in return therefor a receipt from such director which shall also contain a list of such books, papers and documents, and all such books, papers, and documents of officers and servants of counties and cities shall be, when they cease to be current, in like manner delivered to the probate judge of such county, and to the mayor, president of the city commission or other executive officer of the city, and in like manner, such officer to whom such books, papers and documents are delivered shall give his receipt therefor."

"Section 10127.—No records or papers removed from county.—No records or papers of any court must be removed out of the county, except

in cases of invasion or insurrection, whereby the same may be endangered, or unless by order of the court."

It is my opinion that the various state and county officials are authorized to turn over to the Department of Archives and History for permanent preservation all papers, records and documents not in current use, except records in the office of the circuit clerk and records or papers of any court.

Section 10127 specifically states that no records or papers of any court must be removed out of the county. Therefore, I do not think that the records in the office of the register in chancery or the circuit clerk should be removed. See opinion to Hon. William A. Conrad, Clerk, Circuit Court of Mobile County, Quarterly Report of Attorney General, Vol. 19, p. 110.

I see no reason why newspaper files and miscellaneous materials, such as census records and non-current materials of municipalities, should not be deposited with the State Department of Archives and History for preservation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Hon. R. H. Wharton, President,
Jefferson County Commission,
Birmingham, Alabama.

Counties—Purchasing Agents Association—

County governing body may by resolution authorize payment of annual dues of County Purchasing Agent in Purchasing Agents Association of Birmingham which is affiliated with the National Association of Purchasing Agents.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of July 31, 1940, in which you request my opinion as follows:

"Our centralized Purchasing Department handles the buying of supplies and equipment for all County Departments, under the supervision and control of the County Commission.

"It is necessary for our Purchasing Agent to have all available information as to commodities and prices which is now being supplied us

through his membership in the Purchasing Agents Association of Birmingham. This association is a part of the National Association of Purchasing Agents who supply a weekly bulletin, expertly compiled, of business surveys and commodity charts, business trends, etc., a recent copy of which I am enclosing. This association also prints and mails at least one handbook each year of the latest developments and practices in the purchasing field.

"This membership costs the County \$25.00 per year which includes all the above mentioned services. Our Purchasing Agent also has regular contracts with other Purchasing Agents and discusses mutual purchasing problems in group meetings, to the advantage of the County.

"Inasmuch as the County Treasurer has expressed some doubt as to its legality, please advise me if the County Commission has legal authority to pay for one membership in the Purchasing Agents Association of Birmingham for \$25.00 per year, which the Commission feels is a very sound investment."

The Purchasing Agent of Jefferson County is apparently an agent appointed by the County Commission under authority of Act No. 158, H. 596, approved November 3 1932, Local Acts of 1932, page 84, to investigate articles that are to be purchased by the county, secure competitive bids thereof for the commission, and in general, to advise the commission in regard to all purchases. However, the Purchasing Agent is not authorized to purchase as he sees fit but acts under the supervision and control of the County Commission which must, under the general law of this State, examine, settle, and allow all the accounts and claims chargeable against the county. (Section 6755 of the 1923 Code as amended). Furthermore in regard to the construction and maintenance and improvement of public roads, bridges, and ferries, the county governing bodies have legislative, judicial and executive powers. (Section 157 of Act No. 347, H. 391, approved August 23, 1927, General Acts of 1927, page 391.)

In a recent opinion of this office to the Hon. T. C. Garner, Treasurer of Jefferson County, Alabama, rendered July 9, 1940, it was held that the county governing body could pay for membership in the Association of County Commissioners of Alabama.

Also in an opinion directed to Hon. J. W. Heustess, Clerk of the Board of Revenue, Montgomery County, Alabama, rendered August 10, 1940, it was held that the county governing body was authorized to pay annual dues in the American Road Builders Association.

These opinions are based upon the broad authority of county governing bodies in regard to public roads and bridges. As many of the county purchases are necessarily connected with the maintenance and construction of public roads and bridges, I feel that the same reasoning applies to the present situation.

Therefore, the premises considered, it is my opinion that the county commission may by appropriate resolution authorize the payment of the annual dues of the County Purchasing Agent to the Purchasing Agents Association of Birmingham.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 22, 1940.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

**Licenses—Wholesale Lumber Dealers and Jobbers—Planing Mills
—Lumber yards—**

Taxpayer who manufactures or processes, stores and sells his own lumber and timber exclusively, paying the licenses imposed therefor by Schedules 83 and 123½ of Section 348 of the 1935 Revenue Act, as amended, not liable for privilege tax under Schedule 84 of said Section 348 of said Act, for doing business as wholesale dealer or jobber of lumber and timber.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion under date of August 3, 1940, follows:

"I will appreciate your early opinion on the following:

"Is a license tax under Schedule 84, Sec. 348 of Revenue Act of 1935, due to be paid by a person who owns and operates a planing mill, and who is paying a license tax for the same under Schedule 123½ of said Act as amended, and who is also paying a license tax under Schedule 83 of said Act, if all the lumber sold by him is owned by him and comes from his lumber yard in which it has been processed by air-drying, kiln-drying, or by planing in his planing mill?"

From the above, it appears that the taxpayer operates a lumber yard, for which privilege he pays the license tax imposed by Schedule 83 of Section 348 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935, (Gen. Acts 1935, page 256) and in connection therewith also a planing mill for which he pays the license tax imposed by Act No. 231, H. 182, approved March 2, 1937 (Gen. Acts 1936-37, p. 279) incorporated into said Revenue Act as Schedule 123½ of Section 348 thereof.

The question is whether the taxpayer must also pay for the privilege of doing business as aforesaid an additional license or privilege tax imposed by Schedule 84 of said Section 348 upon "each wholesale dealer, or jobber of lumber and timber."

There is nothing in the statement of facts upon which the opinion is requested to indicate that the taxpayer in addition to operating a lumber yard and planing mill engages in doing a wholesale lumber business, or that he buys and sells lumber as a wholesale dealer, merchant or jobber. So far as appears, he manufactures or processes his own product, and sells to consumers exclusively, and does not sell to retail dealers at all.

Webster's International Dictionary, Unabridged, defines wholesale selling as selling in the mass in large quantities to retailers or jobbers rather than consumers.

I am of opinion, therefore, that the taxpayer does not fall within the operation of Schedule 84, *supra*.

Aside from that, however, the privilege of operating a lumber yard and planing mill necessarily includes, implies, or carries with it the power or privilege of disposing of the lumber stored in the yard or processed in the planing mill. It would be an empty privilege to permit the storage of the lumber or the operation of the mill, and at the same time deny the privilege of disposing of or selling the lumber and the product of the mill. *Nash v. State*, 21 Ala. App. 613, 110 So. 797.

Applying the salutary canon of construction that taxing statutes are, in case of doubt, to be construed in favor of the taxpayer (*Yarbrough Bros. Hdwe. Co. v. Philips*, 209 Ala. 341, 96 So. 414; *State v. Seals Piano Co.*, 209 Ala. 93, 95 So. 451), I am of the opinion that in this instance the taxpayer is not liable for a privilege tax, under the facts stated, as a "wholesale dealer, or jobber of lumber and timber" within the meaning of Schedule 84 aforementioned.

Dealers and jobbers both buy and sell. The taxpayer now under consideration only manufactures or processes his wares and then sells them. *Nash v. State*, *supra*; *Biennial Report, Attorney General*, 1928-30, p. 442. Cf. *State v. Downs*, 197 So. 279, 382.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 22, 1940.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Statutes—Constitutionality—

Act No. 465, H. 924, which became a law under Section 125 of the Constitution, is invalid because it violates Section 106 of the Constitution of Alabama, 1901.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 7, 1940, in which you request my official opinion as follows:

"Please advise me whether or not Act 465, H. 924-Waldrop—is constitutional, and if expenditures by the County in holding the referendum election provided for therein would be a legal expenditure?"

The Act to which you refer is Act No. 465, H. 924, and became a law under Section 125 of the Constitution of Alabama, 1901, on June 28, 1940, and said Act reads as follows:

"No. 465)

AN ACT

(H. 924-Waldrop.

"To provide for the submission of a referendum to the qualified electors of all counties in the State of Alabama that had, according to the last Federal Census, a population of not less than 17,775 and not more than 18,425 inhabitants, at the time of the next general election, to determine the sentiments of the qualified electors of said counties on the question of whether or not the Superintendent of Education in said counties shall be elected by the qualified electors thereof.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That a referendum be submitted to the qualified electors of all counties in the State of Alabama that had, according to the last Federal Census a population of not less than 17,775 and not more than 18,425 inhabitants, at the time of the next general election, to determine the sentiments of the qualified electors of said counties on the question of whether or not the Superintendent of Education of said counties shall be elected by the qualified electors thereof. On the ballots to be used in such election shall be printed the following: 'Do you favor the election of the Superintendent of Education, County Solicitor and County Treasurer of this county by the qualified electors of this county? 'Yes

(.....). No (.....).'

"Section 2. That the officials for such election shall be appointed and the votes cast in such election shall be canvassed, tabulated and the result thereof announced and such election shall be held in all things in accordance with the laws governing general elections.

"Section 3. That all laws and parts of laws, general, special, or local, in conflict with the provisions of this act are hereby repealed.

"Section 4. That this act shall become effective upon its passage and approval by the Governor or its otherwise becoming a law.

"This Act became a law under Section 125 of the Constitution, June 28, 1940.

Official

JOHN BRANDON

Secretary of State."

In my opinion this Act is clearly unconstitutional. The Supreme Court of Alabama in passing on the validity of

"An Act entitled, 'An act to fix the salary of the judge of the county court in all counties having a population of not less than twenty-three thousand one hundred and fifty (23,150) and not more than twenty-three thousand two hundred and fifty (23,250) according to the federal census of 1910, or any subsequent federal census, and provide for the payment of the same,' held local law. Said the court, 'The effect of all of our decisions, in short, has been that where there is a substantial difference in population, and the classification is made in good faith, reasonably related to the purpose to be effected and to the difference in population which forms the basis thereof, and not merely arbitrary, it is a general law although at the time it may be applicable to only one political subdivision of the state; but if the classification bears no reasonable relation to the difference in population, upon which it rests, in view of the purpose to be effected by such legislation, and clearly shows it was merely fixed arbitrarily, guised as a general law, and, in fact, is a local law, it is then in plain violation of the Constitution and cannot be upheld. * * * There can be no pretense whatever either of logic or common sense why in those counties under 25,000 population, and yet lacking 150 or 200 population of coming within the figures as arbitrarily fixed by this act, the county court judges should still receive only \$300 per annum (Acts 1915, p. 603), while in this particular county the judge of the county court should receive \$600 additional. The classification as to population has not the semblance of necessity, reason, or substantial merit upon which to stand. It was merely arbitrarily fixed so that under the guise of a general law this local legislation was enacted.' Reynolds, County Treasurer, et al. v. Collier, 204 Ala. 38; 85 So. 465."

Again, the Supreme Court in passing upon the constitutionality of an act entitled An Act:

"'To create the office of county solicitor in all counties having a population of not less than eighteen thousand one hundred and twenty-five and not more than eighteen thousand nine hundred according to the federal census of 1910, or any subsequent census, and to provide for the election of such solicitor by the qualified electors of such counties and prescribe his qualifications and duties and fix his compensation,' held to be a local act. The Court said, 'This law does not appear to have been made in good faith a general law on population basis. It appears to be an evasion of the clear mandate of the Constitution. The intent seems arbitrarily to apply it to these three counties out of sixty-seven counties as a local law, but with general law appearance through the population basis. This classifies it under the foregoing definition of this court as a local law, and not a general law.'—Anderson vs. State, ex rel. Moorer, 206 Ala. 301; 89 So. 452.

In the case of Ward vs. State ex rel. Lea, 224 Ala. 242; 139 So. 416, the court laid down the following rule:

"'If, however, the required legislation must itself be narrow and arbitrary and an unanticipated freak of chance and a turn of the wheel of fortune defying probabilities', then, of course the act itself bears the marks of arbitrary classification, and is to be condemned as such. But,

in either event, the requirement for future legislation is of evidentiary character, the effect of which is left to be determined as it arises under the peculiar conditions of each particular case.'"

"The difference in population must be substantial, and the classification must be made in good faith and reasonably related to the purpose to be effected by the act. These conditions appearing, the fact that at the time the law may be applicable to only one political subdivision of the State, will not suffice for its condemnation. If, on the other hand, the classification is not in good faith, bears no reasonable relation to the difference in population upon which it rests in view of the purpose to be effected by such legislation, and was arbitrarily fixed, the law will be condemned as local, and as having been passed merely under the guise of a general law in violation of our Constitution."

Act No. 465, supra, applies to counties that had a population of not less than 17,775, and not more than 18,425 inhabitants according to the last Federal Census. The substance of the Act is for the sole purpose of permitting the qualified electors of Lamar County, (this being the only county within this population classification according to the census of 1930), to hold an election to determine the sentiments of the voters on the question of whether or not the Superintendent of Education should be elected, although the Act is disguised as a general law.

I am of the opinion that the classification employed by the Legislature was arbitrarily chosen for the purpose of evading the requirements of notice and intention to apply therefor under Section 106 of the Constitution, and said Act is, therefore invalid.

I do not believe that county funds should be expended for the purpose of holding such a referendum, inasmuch as it is my judgment that the said Act is unconstitutional. However, I cannot say that I believe you would be liable for any funds so expended because of the provisions of Section 2619, Code of Alabama, 1923, which is as follows:

"Section 2619. Officer paying and person receiving money paid under void law not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 23, 1940.

Hon. Jas. C. Brown,
Register in Chancery,
Tuscaloosa County,
Tuscaloosa, Alabama.

Official Bonds—The official bond of the register of the circuit court in equity covers all funds of whatever nature—state, county, or individual,—that come into his hands as such register and by virtue of his office.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 10, 1940, in which you request my official opinion as follows:

“In re: Premium on Trust Fund Bond.

“We have on hand approximately \$9,000.00 (in a rather complicated case) which we will be required to keep on hand for possibly some twenty years or more before it can be distributed to its rightful owners and in fact, we have other smaller amounts of a similar nature.

“As custodian of these funds, I am required to furnish a bond as Register, for the safe keeping of same, the premiums on said bond being paid by Tuscaloosa County through its Board of Revenue. The Board of Revenue has raised the question as to whether or not it is proper for the County to pay premiums on that part of the Register's Bond covering these Funds that are to be kept on hand for years to come and feel that such premiums should be charged to the cause in which such funds are involved or taxed as a part of the costs, as no one gets any benefit from such funds, except the parties involved—in other words, said Board feels that a great hardship is being worked on the County by way of being required to pay premiums on Bonds for this type of Trust Funds.

“I therefore desire a ruling from you, as to whether or not, the premiums on such a bond could be charged to the case in which said funds are involved as other items of costs are charged and thereby relieve the County from payment of such premiums.

“If you see no other way around the county paying such premiums, while in the possession of the Register, then, can you suggest some other way whereby such funds may be safely handled, and the county relieved from payment of such premiums?”

In answering your request I am presuming that the funds referred to come into your hands as Register of the Circuit Court and by virtue of such office. If so, these funds are covered by your official bond and if for any reason your bond is not sufficient to cover same, it is the duty of the judge of the circuit court of Tuscaloosa County to require that you make such ad-

ditional bond as will protect such interest. In this connection I call your attention to Section 6505, Code of Alabama, 1928, (Michie), which is as follows:

"Section 6505. Additional Bond.—The circuit judge, whenever the public interests demand, must require of such register an additional bond; and on failure to give the same within the time fixed by the circuit judge therefor, the circuit judge must remove him from office. Such additional bond must be approved, filed, and recorded as the first official bond."

I also call your attention to an Act of the Legislature approved April 20, 1933 No. 191 H. 344, General Acts Extra Session 1933, p. 203, known as the "Bains Act", and especially to Section 16 of said Act, which is as follows:

"Section 16. That when in the judgment of the Court of County Commissioners, Board of Revenue or like County governing body of any County any bond provided for in this Act is insufficient either as to the penalty or the surety to fully protect the public interests and safeguard the public funds such governing body may require such officer to make an additional bond in such amount and with such sureties as may be approved by said governing body; provided the foregoing shall not apply to the County Superintendent of Education or the County Treasurer of public school funds but when in the judgment of the County School Board the bond of the Superintendent of Education or the County Treasurer of public school funds of said county is insufficient either in penalty or surety to fully safeguard the public school funds, such County School Board shall require such officer to make additional bonds in such amounts and with such sureties as may be approved by said Board."

It is apparent from the above that the Commissioners Court, Board of Revenue, or other governing body of a county, when it deems it proper, may also require the register of the circuit court to give additional bond.

You speak of the county having to pay the premium on the bond which covers this trust fund. I do not think this a hardship upon the county when it is remembered that if a county is to enjoy the privileges and protection which comes through civil government, it must be willing to pay the price. The reason for your making a bond in the first place is for the protection of the citizens of your county and state, as well as for the protection of the county and state. Those having business in your court have nowhere else to look for safety and protection from a legal point of view except to your bond. One of the functions of your official bond is for the protection of just such emergencies as you have here. An officer is not only liable to the county and state for the funds in his hands, but is also liable for funds of individuals coming into his hands by virtue of his office.

Mason v. Crabtree, 71 Ala. 379;

Isbell v. Riddle, 213 Ala. 686, 106 So. 143;

Marion v. Woods, 56 Ala. 1;

Savage v. Matthews, 98 Ala. 535, 3 So. 328.

The quotations and citations I have given above were for the purpose of showing that the legislature has all power in fixing the bonds of the different state and county officials and their liability, and that your official bond covers just exactly the situation you have here. I find no other provision made which can be substituted for your official bond in matters of this character.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 24, 1940.

Hon. Chester Walker, President,
Tuscaloosa County Board of Revenue,
Tuscaloosa, Alabama.

Taxation—Exemptions—Agency Corporations—

One corporation of which another corporation holds and owns all the capital stock, organized and functioning solely for the purpose of operating a power plant used by the latter to manufacture aluminum, is entitled to exemption from property taxation to the same extent as the owning corporation under Section 4 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of August 22, 1940, follows:

"The Reynolds Metal Company is contemplating the construction of a large aluminum plant in the City of Tuscaloosa, Alabama. This plant will be constructed with funds borrowed from the Reconstruction Finance Corporation. The amount so borrowed is not sufficient to construct the necessary steam plant for the generation of electric power to be used in the operation of the aluminum plant.

"It will be necessary, therefore, for the Reynolds Company to borrow money from private sources for the erection of the steam plant on lands contiguous to the aluminum plant lands. Private lenders of money will not make a second mortgage on the aluminum plant for monies to be used in the erection of the steam plant. This will necessitate the organization of another company in whose title the lands necessary to the steam plant will be taken. Private capital can then be obtained to commence the construction of the steam plant. The Reynolds Company will own all the capital stock of the steam plant company and will furnish all of the necessary working capital for the operation of the

steam plant company and will purchase from the steam plant company the entire output of the steam plant at actual cost of the power generated by the steam plant company for use in the manufacture of aluminum at the Reynolds plant. (Underscoring ours)

"In view of these facts, would the real and personal property (except lands upon which located) of the steam plant company be exempt from state, county and municipal taxation provided under Section 4 of the Revenue Law of 1935 (Acts, 1935, page 256)."

Under the circumstances above stated, I am of the opinion that the steam plant company will be what has come to be known as an agency corporation. It will be operated and owned by the Reynolds Company exclusively as an integral, essential part of its aluminum plant, as much so as if legal title to its machinery and equipment were vested in the Reynolds Company.

In an early case *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 43 N. W. 840, 6 L.R.A. 234 (1889), the question was whether defendant must pay taxes, measured by a percentage of its gross receipts from tolls or rentals paid to it by several railroad companies for whose joint use and benefit defendant had been incorporated, said railroad companies together owning and holding the entire capital stock of defendant and themselves paying taxes to the State under the same statute invoked as the basis of defendants alleged liability—the tax in each instance being considered to be a property tax, or a tax in lieu thereof.

Holding that defendant was not liable for the tax, the court as the basis of its decision observed as to defendant that defendant "was merely designed as an agency through which there might be furnished, for the common benefit and use of all railroads coming into the city, a union depot and terminal facilities, to better enable them to perform their duties as common carriers in receiving, delivering, and transferring passengers and freight in this city."

The court further noted:

"This plant was provided and constructed with the proceeds of stock issued to and paid for by these several companies, and with the proceeds of mortgage bonds issued and sold by the defendant. The greater part of the expense was, however, defrayed out of the proceeds of the mortgage bonds, only a comparatively small amount of stock having been issued. The rentals or tolls for the use of the depot are apportioned among and paid by the different companies in proportion to the amount of such use by each company, and the aggregate annual amount of all rentals and tolls is the actual cost of furnishing and maintaining the plant * * *."

Again (43 N. W., p. 842) the court observed, as the basis for decision:

"It is evident from this statement of facts that the sole and only function performed by the defendant corporation is to furnish, at cost, a union depot and terminal facilities for the common use of these different railway companies, and that the scheme of forming a corporation for that purpose, and issuing stock, is but a more convenient and economical method of holding the property and managing the business than it would be to hold and manage it as tenants in common." (Emphasis supplied)

Here then we find a situation strikingly similar, if not indeed identical, to that under consideration, except that in the instant situation all the stock of the agency corporation is to be owned and held by one other corporation, whereas in the **St. Paul Union Depot Co. case, supra**, the agency's stock was held by several corporations for their joint and several benefit.

In a recent case in the United States Circuit Court of Appeals, 7th Circuit, **Consolidated Indiana Coal Co. v. National Bituminous Coal Commission**, 103 F. (2d) 124, decided March 13, 1939, the question was whether coal produced by petitioner and consumed by the Chicago, Rock Island & Pacific Railway Company owning and holding petitioner's entire capital stock, financing petitioner's operations, and consuming petitioner's entire output of coal, was subject to the tax imposed by the federal Bituminous Coal Act of 1937 or was exempt from such tax by reason of a specific exemption under the act of coal produced and consumed by the producer.

The respondent's counsel urged, as in the St. Paul case, that the petitioner and its owner, the railway company, were distinct and separate legal entities, and therefore that coal produced by one and consumed by the other did not come within the purview of the exemption.

The Court of Appeals held, however, after exhaustive discussion of the authorities, that petitioner was an "agency or instrumentality merely of the railway company, formed in order that the latter **might have a cheaper and more dependable supply of fuel for its operations,**" and that, therefore, coal produced by the agent and consumed by the principal fell within the exemption from tax.

In reaching its decision the court on page 129 observed that the separate and distinct legal entity theory was not applicable "where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a **mere agency or instrumentality of the owning company or companies.** (Citing cases)"—(Emphasis supplied)

The court also quoted (103 F. (2d) P. 129) with approval from **State v. St. Paul Union Depot Co., supra**, as follows:

"The state plants itself on the technical ground that defendant is a separate and independent legal entity, and that we have no right to consider the functions which it performs, or the relations which it bears to the railway companies who own its stock and use its depot. We think this is too narrow and technical a view of the case. When evasions have been resorted to by railway companies or others to escape taxation, we have unhesitatingly looked through the external form or dress to the substance of the transaction, and the same rule should be applied against the state."

The doctrine of these cases, the one decided in 1889, the other in 1939, has not been question or denied in any court so far as I can ascertain. Others might be cited in support thereof. **Ledlow v. Goodyear Tire & Rubber Co.**, 189 So. 78 (Ala. 1939) and cases cited, p. 80.

The particular facts of each case must be considered in determining whether or not one corporation is an "agency" in its relations with its owner corporation and whether or not the two must be considered as separate entities for purposes of taxation or as a single entity. **Southern Pacific Co. v. Lowe**, 247 U. S. 330, 62 L. ed. 1142; **C. M. & St. Paul Ry. Co. et al. v. Minneapolis & Association**, 247 U. S. 490, 62 L. ed. 1229.

There can, I think, be no question that the proposed steam power company, formed solely for the purpose of supplying the aluminum company with power for the operation of its aluminum plant, and wholly owned and controlled by it, without any outside operations whatever, and operated without profit, solely as an integral part of the owner corporation, falls within the definition of "agency corporation". As such, its corporate identity is merged in that of the owner. And according to the doctrine hereinabove stated, the agency and its owner are one, to all intents and purposes within the exemption from taxation of aluminum plants granted under Section 4 of the Revenue Act of 1935, reading as follows:

"Section 4. All real and personal property, except lands upon which located of factories of plants, manufacturing calcium cyanamid (lime nitrogen), aluminum or aluminum products, shall be exempt from state, county and municipal taxation for ten (10) years after the beginning of the construction of such plant or factory."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 26, 1940.

Hon. I. C. Heck,
State Comptroller,
Department of Finance,
Capitol.

**Taxation—Tax Assessment—Tax Assessors—"Owner Unknown"—
State Comptroller—**

1. Tax Assessor not authorized to assess property to "owner unknown" if by examination of the records in the office of the judge of probate he may ascertain the record title owner thereof. Revenue Act, 1935, Sec. 53.

2. State Comptroller authorized to cancel sales of property so erroneously assessed to owner unknown and request tax assessor to assess same as provided in Section 232 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated July 24, 1940 follows:

"We respectfully request your official opinion on the following:

"1. Does a Tax Assessor have the authority to assess property to 'Owner Unknown' when the records in the office of the Judge of Probate disclose the record title owner of the property?

"2. If your answer to Question Number One is in the negative, am I, as State Comptroller, authorized to cancel such sales from the records of the State Land Commissioner, and request the Tax Assessor to escape the property for taxation?"

Among the duties of the tax assessor as to assessment of property for taxation, the statute provides:

"Section 53. Whenever the tax assessor knows or learns of any property, real or personal, subject to taxation in his county, the owner of which he does not know, and which is not embraced in any tax return made to him or before the third Monday in January by any taxpayer, he shall list and make upon the proper blank a return describing said property according to the best information he can obtain and assess the same 'owner unknown' at sixty per cent of a fair and reasonable market value, and in any notice or advertisement or motion for decree of sale it shall be described as so returned; and he shall also note the failure of the owner to make such return, and shall also note the accrual of the penalty of ten per cent of the taxes to be assessed thereon. No lands shall be returned to 'owner unknown' until the Assessor shall have made a demand upon the person, if resident in the county, or by registered mail, if non-resident, whose address is known, to whom such lands or property was last assessed shall make a diligent inquiry to ascertain the name of the owner of said lands or property. Any assessor or deputy assessor who fails to comply with the requirements of this section shall be guilty of a misdemeanor, and fine not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00)." (Emphasis supplied).

Revenue Acts of 1935, Section 53, (Gen. Acts 1935, p. 284).

In *Oliver v. Robinson*, 58 Ala. 46, a tax title was held void where land was assessed to "owner unknown" and by inquiry the assessing officer could have ascertained the name of the owner. In that case the court observed:

"It is manifest that proper inquiry and search were not made, to ascertain who was the owner of these lands. Lands cannot be lawfully assessed to 'owner unknown,' when the owner is known; and if the assessor or collector, who makes the assessment, has, at the time, the means of ascertaining who the owner is—such as open possession by the owner,—this is equivalent to actual knowledge, and will avoid a sale made under such assessment."

"It is, therefore, accepted as an axiom when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law, in all the proceedings of which the sale was the culmination."

The doctrine of the **Oliver-Robinson** case, *supra*, as to sales for taxes assessed to "owner unknown" is correctly stated in the 4th headnote as follows:

"Lands can not lawfully be assessed to 'unknown owner,' if, at the time of making the assessment, the officer had the means of ascertaining, by proper inquiry and search, who the owner was—such as the owner's occupation or open possession, or other information which would make known the owner; and having such means of information, he can not assess the lands to 'unknown owner,' and sale under the assessment would be void."

That doctrine has not been questioned. It was reaffirmed in *Morris v. Card*, 223 Ala. 254, 257, 135 So. 340, where it was said:

"The tax sale under which appellant claims title is asserted to be invalid for the reason that the tax assessor made only a casual attempt to locate the owner before assessing it to 'owner unknown.' The provision of the statute under which the assessment was made is section 2118, Code of 1907. A rigid adherence to directions and forms of the statute regulating assessment and sale of lands for taxes is required (*National Bank of Augusta v. Baker Hill Iron Co.*, 103 Ala. 635, 19 So. 47), and the burden of proof as to this is on him who claims under the tax title. *Pollak v. Milam*, 190 Ala. 569, 67 So. 381; *Drennen v. White*, 191 Ala. 274, 68 So. 41; *Galloway Coal Co. v. Warrior Black Creek Coal Co.*, 204 Ala. 107, 85 So. 440; *Loper v. E. W. Gates Lumber Co.*, *supra*; *Greil Bros. v. City of Montgomery*, 182 Ala. 291, 62 So. 692, Ann. Cas. 1915D, 738; *Lowe v. Martin*, 79 Ala. 366. Land cannot be assessed to an unknown owner if the assessor by proper inquiry and search can ascertain the owner."

See also *Watson v. Baker*, 228 Ala. 652, 154 So. 788.

The duty of the tax assessor to make diligent inquiry before making an assessment to owner unknown is declared and enjoined by the statute itself. Failure to do so is a misdemeanor. Sec. 53 of 1935 Revenue Act, *supra*.

I am of opinion that an assessment of property to "owner unknown" is void, and that a sale based upon such assessment is likewise void, if the tax assessor making such assessment, by examination of the deed records in the office of the judge of probate, or by such other inquiry as would suggest itself to a diligent and prudent man, can, before making the assessment, ascertain the name of the true owner of the property so assessed.

Under Section 232 of the 1935 Revenue Act (Acts, 1935 p. 357), it is the duty of the State Comptroller to cancel void sales and to follow the directions of the statute reading as follows:

"Section 232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and

de'iver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale. When the same are received by him, and if, in his opinion, such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificates, he shall so declare it and return the certificate to the Judge of Probate, and charge the account of the officer making the error with all taxes, interest, fees, and costs involved in said sale. The Comptroller shall notify the Judge of Probate who issued the certificate of such cancellation, and also shall notify the Tax Assessor of the County in which the property is situated, and direct him to assess the property as an escape for the years in which it was subject under existing laws. * * *

See also **Quarterly Report, Attorney General, Vol. XII, p. 117; Vol. XVIII, p. 144.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 26, 1940.

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

County Purchases—County governing body of Colbert County should comply with advertising provision of Act No. 34, H. 218, approved March 8, 1933, (Local Acts, 1933, Extra Session, p. 17) before entering into "lease sale contract" for stone crushing plant.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated August 13, 1940 follows:

"August 12th in a regular meeting of the Board of County Commissioners of Colbert County, the Commissioners decided by a vote of three to one to enter a rental contract renting a stone crushing plant. The rental contract provides for an option to purchase by the renter. Considering a Local Act which provides for advertising of intention to purchase all purchases made by the County, could Colbert County, through its governing body, legally enter the attached agreement without advertising.

"I would appreciate your giving me your opinion at your earliest possible convenience.

"Please return contract."

In my opinion your question should be answered in the negative.

Act No. 34, H. 218, approved March 8, 1933, Local Acts, 1933, Extra Session, page 17, provides as follows:

"Section 1. The Board of County Commissioners, or other County governing body, of Colbert County, as such county governing body as now constituted or as may be hereafter constituted, is hereby charged with the duty of purchasing in the name of and for the County of Colbert, all road machinery, tools, implements, books, blanks, office stationery, office or house furniture, fixtures, articles or things which may be required by law for the said County.

"Section 2. The said county governing body, as it now constituted or as may be hereafter constituted, shall make the said above referred to purchases only after competitive bids have been submitted and the said county governing body shall advertise for said bids at least one time in a newspaper published in the County of Colbert, and shall post a notice calling for said bids at least three weeks before the letting of such contracts at the courthouse of said County, in order that due public notice may be given of the intention to make said purchases. Nothing in the second section of this Act shall apply to the purchase of postage stamps.

"Section 3. Failure to post the notices of such call for bids or the purchasing of the said articles and things required by the County, without first having received competitive bids, shall be declared a misdemeanor and shall be punishable by a fine of not less than One Hundred Dollars (\$100.00) nor more than one Thousand Dollars (\$1,000.00) in each and every case.

"Section 4. All laws or parts of laws in conflict with any provisions of this Act are hereby repealed.

"Section 5. This Act shall go into effect immediately upon its approval by the Governor.

"Approved March 8, 1933."

I have carefully examined the enclosed contract. In my opinion, this contract amounts to a sale or purchase contract, under the Act, *supra*. and the governing body of Colbert County should comply with the advertising provision of the Act, *supra*, before entering into the same.

In Jones' Chattel Mortgages and Conditional Sales, Vol. 3, Sections 953 and 956, pp. 61 and 64, it is said:

"Sec. 953. Attempts to establish nature of contract by name given it. —Calling a rose by another name might not affect its aroma, but neither would it make it something other than a rose. So, calling a conditional sale a lease does not, of itself, establish the character of the transaction.

"The ingredients of a cake determine its flavor; and the presence in a contract of the elements of a conditional sale establishes its character as such, whatever the parties may call it. Look below the headlines, is a wise admonition as to press reports; and looking below the caption of a contract is a consistent practice of the courts in determining what kind of agreement the parties have made. * * *"

"Sec. 956. Testing the contract—Whether title ultimately to pass.—
* * * As between a conditional sale and a lease, or hiring agreement, the chief question is as to whether title is intended ever to be transferred. If it is not so intended, the transaction is a lease; if it may, or must, depending upon the performance of a condition by the transferee, it is a conditional sale. * * *"

See also opinion of this office to Hon. Harry K. Martin, Judge of Probate, Houston County, Dothan, Alabama, under date of March 15, 1932, Office Edition, Vol. 9, page 97.

It would be an anomaly to hold that your governing body had to advertise for bids before making direct purchases, but that it could enter into a contract like this one without advertising.

In the case of **In Re Opinion of the Justices**, 225 Ala. 502, 144 So. 111, our Supreme Court said:

"That which is forbidden directly cannot be done indirectly, and the law abhors evasions and subterfuges."

I am returning the copy of the Contract.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 26, 1940.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Military Reservations—

Property leased by the Federal Government under one year lease with renewal provision providing for renewal from year to year at the option of the Government, but not to exceed ninety-nine years or less, is not a "place purchased" within the meaning of Article I, Section 8, Clause 17 of the Constitution of the United States and, therefore, the Alabama Beverage Control Act is applicable thereto.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 13, 1940, in which you request my opinion as follows:

"On August 18, 1938, the Attorney General's office rendered an opinion to the effect that the Alabama Beverage Control Act was not effective upon military reservations within the confines of the State of Alabama ceded to the United States Government.

"Recently the United States Government rented the municipal airport for a number of years, establishing there a training base for enlisted men and officers of the U. S. Army.

"We have received several inquiries relative to the Alabama tax on malt or brewed beverages, also other alcoholic beverages to be sold on this reservation which has not been ceded to the U. S. Government but merely leased for a certain number of years.

"It will be appreciated very much if you will advise us as soon as possible whether or not this military reservation would be entitled to the same privileges extended to military reservations located in Alabama on ceded territories, that is, Maxwell Field and Fort McClellan."

I have carefully examined the agreement entered into between the State of Alabama and the United States of America, and the agreement between the City of Montgomery, Alabama, and the United States of America, relative to the lease of the properties concerning which you inquire.

By the lease agreement entered into between the State of Alabama and the United States of America on the first day of July, 1940, 70.7 acres of land, more or less, located in Montgomery County, State of Alabama, were leased to the Government

"To have and to hold the said premises with their appurtenances for the term beginning July 1, 1940, and ending with June 30, 1941."

Paragraph 5 of this lease agreement provides for a renewal of such lease at the option of the Government, as follows:

"5. This lease may, at the option of the Government, be renewed from year to year at a rental of \$1.00 per year until June 30, 1945 and then at a rental of \$7.100 per year for the next ninety-four (94) years and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least 90 days before this lease or any renewal thereof would otherwise expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond the thirtieth day of June, 2039."

By the lease between the City of Montgomery, Alabama, and the United States of America, made and entered into on the first day of July, 1940, the City of Montgomery leased to the Government certain properties described in the lease

"To have and to hold the said premises with their appurtenances for the term beginning July 1, 1940, and ending with June 30, 1941."

Paragraph 5 of this lease is as follows:

"5. This lease may, at the option of the Government, be renewed from year to year at a rental of \$1.00 per year for Tract A for 98 years beginning July 1, 1941, and \$1.00 per year for Tract B for 5 years beginning July 1, 1941, and thereafter and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least thirty days before this lease or any renewal thereof would otherwise expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond the 30th day of June, A. D. 2039, as to Tract A, and not beyond the 30th day of June 1975, as to Tract B."

Both of the lease agreements hereinabove referred to contain statements regarding the purpose for which the property will be used; namely, as a military training center, for United States Army Air Corps Training and operations.

It will be seen, therefore, that all of the property concerning which you inquire will be occupied by the Federal Government for United States Army Air Corps Training and operation purposes under leases for one year, which leases may be renewed from year to year at the option of the United States Government upon thirty days' notice. It is provided, of course, in the leases, as appears above, that no renewals shall extend the period of occupancy beyond ninety-nine years or less from date of execution of such instruments.

The question is presented as to whether or not this property, occupied by the Federal Government under the lease as hereinabove detailed, is held by the United States Government under such circumstances as to vest exclusive jurisdiction in that Government to the exclusion of the right of the duly constituted authorities of the State of Alabama to make effective thereon the provisions of the Alabama Beverage Control Act (Act No. 66, H. 44, passed by the House and Senate on February 2, 1937, notwithstanding veto, under Section 125 of the Constitution of Alabama, 1901, General Acts, 1936-37, page 40).

The Constitution of the United States in Article I, Section 8, Clause 17, makes provision for the exercise by Congress of exclusive legislation "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." (Emphasis supplied) It has been held that "exclusive legislation" is consistent only with exclusive jurisdiction. **James v. Dravo Contracting Co.**, 302 U. S. 134; **State v. Blair**, 238 Ala. 377, 191 So. 237, 239.

It will be noted from the foregoing quotation from the Constitution of the United States that exclusive jurisdiction is given only over all places purchased by consent of the legislature of the state in which same shall be. No such exclusive jurisdiction is given, or, in my judgment, contemplated, where the lands or places are not "purchased", but are leased or rented merely. This question, while never having been presented to the Supreme Court of the United States for decision, so far as my research reveals, has

been made the subject of some discussion by the Circuit Court of the Southern District of Ohio in the only Federal case which I have been able to find dealing with the subject, i. e., **United States v. Tierney**, (1864) 1 Bond (U. S.) 571, 28 Fed. Cas. No. 16,517.

In the Tierney case, the court states that the facts are, in substance, that on March 19, 1863, by a written agreement, one Thos. Kirby "leased to the United States a pasture-field containing about sixty acres of land for one month with the privilege of using and occupying the same for six months, at the option of the Government, at a stipulated rent." The court considered the following question: "Was the field rented by Kirby to the United States a place within the terms of the Constitution, within or over which the United States had 'sole and exclusive jurisdiction'" With respect to the rental feature, the court concluded:

"The places over which exclusive jurisdiction is granted, are those which have been **purchased** by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land **rented** by the Government for a temporary purpose."

The court found a still further objection to the exercise of exclusive jurisdiction in this case, stating:

"An unanswerable objection to the exercise of exclusive jurisdiction in this case is that the tract of land was not purchased of (sic) the United States by **consent** of the legislature of the State of Ohio, for this consent is essential to the exercise of exclusive jurisdiction by the United States."

Both of these objections appear in the present case. Here the land was not **purchased** by the United States, but is merely rented by the Government from year to year. Here also there is lacking the consent of the Legislature of the State of Alabama.

Sections 1505 and 1506 of the Code of Alabama, 1923, (the statutory provisions of this State by which jurisdiction is given generally to the Federal Government over property acquired by it in this State) cede to the United States jurisdiction "over all lands which have been or may hereafter be **purchased** or otherwise acquired" for the purposes enumerated.

These sections were considered by the Supreme Court in the recent case of **State v. Algernon Blair**, supra. The court therein concluded that these sections were now the controlling law with respect to the nature of the jurisdiction acquired by the Federal Government when it purchased property in this state. Reference was made in the Blair case to Sections 3147-3161 of the Code of Alabama, 1923, which sections also relate to the extent of the jurisdiction obtained by the Federal Government over lands acquired in the State of Alabama, and concluded that Sections 1505 and 1506 would control in the event of conflict.

It would appear, therefore, that inasmuch as the Federal Government has not **purchased** or **acquired** the land in question, but has leased it merely, and inasmuch as the Legislature of Alabama has not consented to the purchase or acquisition of the same, and inasmuch as the statutes of the State

of Alabama granting exclusive jurisdiction to the Federal Government over lands acquired thereby are limited to lands **purchased or acquired** by the Federal Government so long as it shall be the **owner** thereof, the Alabama Beverage Control Act, enacted in 1936, prior to the lease of these lands, would be fully operative over the territory in question.

If additional authority need be cited, your attention is called to the case of **People v. Bondman**, 291 N.Y.S. 213, 161 Misc. 145, wherein it appeared that the Federal Government had entered into a lease with the owners of certain property for the use of such property as a Civilian Conservation Camp, and that buildings necessary for the operation of the camp had been constructed thereon. The court held that this acquisition by the Federal Government was "not a purchase of property or an acquisition of property under the provisions of the Federal Constitution." See also **Baltimore v. Linthicum**, 170 Md. 245, 183 A. 531.

Numerous other cases could be cited holding that in order that the United States may possess exclusive legislative power over a particular tract, except such power as may be necessary to the effective use of such tract by an instrumentality of the Federal Government, the tract must have been acquired by purchase with the consent of the state. In **Chicago, etc. Rwy. Co. v. McGlinn**, 114 U. S. 545, the Supreme Court of the United States concludes:

"This is the only method prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended."

See also **Fort Leavenworth R. Co. v. Lowe**, 114 U. S. 525; **Collins v. Yosemite Park and Curry Co.**, 304 U. S. 518; **Silas Mason Co. v. Tax Commission of Washington**, 302 U. S. 186; **James v. Dravo Contracting Co.**, *supra*, and **Crook v. Old Point Comfort Hotel Co.**, 54 F. 604, 608.

You are therefore advised that, in my opinion, the Alabama Alcoholic Beverage Control Act is fully effective upon the property in question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 26, 1940.

Hon. M. R. Joiner, Clerk,
Circuit Court, Talladega County,
Talladega, Alabama.

Officers—Register in Chancery may serve as Clerk of Jury Commission in counties having a population of 75,000 or less.

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 1, 1940, which is as follows:

"I have been Clerk of the Circuit Court, Clerk of the Chancery and Clerk of the Talladega County Jury Commission. I was not a candidate for the Clerk of the Circuit Court, therefore, my term of office will expire in January, 1941. I expect to continue as Register in Chancery.

"Can I hold the places of Register in Chancery and Clerk of the Jury Commission if appointed?"

In my opinion, the Register in Chancery of Talladega County may legally serve as Clerk of the Jury Commission of that county.

This office has heretofore held that the Clerk of the Jury Board (Commission) is not an office of profit. I am herewith enclosing a copy of an opinion rendered to Hon. Bradford Cooper, Treasurer of Marion County, Alabama, under date of September 29, 1933, dealing with the status of a Clerk of the Jury Board (Commission). While this opinion dealt with the Clerk of the Jury Board appointed under the law then in effect, rather than the Clerk of the Jury Commission appointed under the 1939 Act, *infra*, it is equally applicable to the Clerk of the Jury Commission. Therefore, there is no constitutional inhibition against the Register in Chancery holding such an office in a county which has a population of 75,000 or less. The 1930 federal census gives Talladega County a population of 45,241.

I call your attention to Section 8 of Act No. 59, S. 55, approved March 2, 1939 (Gen. Acts 1939, p. 86), which is as follows:

"Section 8. In Counties having seventy-five thousand population or less by the last Federal census preceding the employment, the Clerk of the Circuit Court may be employed as the Clerk of the Jury Commission and in such counties the Clerk of the Jury Commission whether he be the clerk of the Court or not, shall be paid for his services rendered under the direction of the Jury Commission the sum of Five Dollars (\$5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent Federal Census, the Commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the Jury Commission, the sum of Five Dollars (\$5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than two hundred thousand population according to the last or any subsequent Federal Census, the Jury Commission in any such county shall have authority to employ such clerical assistance as such Commission deems necessary and proper, and may expend for such clerical assistance in compensation and in paying their reasonable and necessary expense in performing the duties of their employment a sum not to exceed Four Hundred and Fifty Dollars (\$450.00) per month to be paid out of the county treasury upon the order of the President of the Jury Commission.

In counties having a population of 75,000, or less, according to the last preceding Federal census the clerk of the Jury Commission shall not receive more than \$300.00 as compensation for his service in any one year."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 26, 1940.

Hon. John R. Robinson,
Member, House of Representatives,
Lee Building,
Gadsden, Alabama.

Alabama Beverage Control Act—

1. Sections 4617, 4619, 4662, 4663 and 4671 of the Code of Alabama, 1923, relating to unlawful drinking places and liquor nuisances, are not repealed by the Alabama Beverage Control Act.

2. Under facts stated, business establishment in "wet" county held not to be a "liquor nuisance" as defined in Section 4619, Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 9, 1940, in which you request my opinion as follows:

"Will you kindly furnish me an official opinion on the following questions:

"1. Does the Alabama Alcoholic Beverage Control Act, which became effective in Etowah County in February 1937, repeal sections 4617, 4619, 4662, 4636 and 4671 of the 1923 Code of Alabama?

"2. Could there be a liquor nuisance as defined in Section 4619 of the 1923 Code of Alabama where the proprietor of a business establishment had obtained a retail liquor and beer license from the Alcoholic Beverage Control Board and the City of Gadsden, and were only selling State stamped whiskies and beers."

Replying to your first inquiry, you are advised that in my opinion the Alabama Beverage Control Act (Act No 66, H. 44, passed by the House and Senate on February 2, 1937, notwithstanding veto, under Section 125 of the

Constitution, Gen. Acts 1936-37, page 40) did not repeal Sections 4617, 4619, 4662, 4663 or 4671 of the Code of Alabama, 1923.

These sections relate to unlawful drinking places and liquor nuisances and are part of Chapter 167 of the Code of Alabama, 1923, defining prohibited liquors and providing for the abatement of liquor nuisances.

An inspection of each of these sections reveals that in defining "unlawful drinking places" and "liquor nuisances," and in treating the punishment for the maintenance thereof, the words "prohibited liquors or beverages" are always employed. The Alabama Beverage Control Act contains explicit provision in Section 61 thereof against repealing "any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor." Inasmuch as the sections hereinabove noted refer to "prohibited liquors and beverages," it is now necessary to construe such terms, in connection with the Alabama Beverage Control Act, as liquors and beverages now illicit or now in violation of the law, said products having been redefined and provided for under the Alabama Beverage Control Act. Such was the conclusion reached by this office in an opinion rendered under date of December 3, 1937, to Hon. James A. McCollum, Solicitor, Inferior Court of Tuscaloosa County, Quarterly Report of Attorney General, Vol. IX, page 136, in holding that Section 4639 (making it unlawful to store prohibited liquors or beverages on premises where beverage business is conducted), and Section 4713 (making it unlawful to store, keep or warehouse prohibited liquors for another) of the Code of Alabama, 1923, were not repealed by the Alabama Beverage Control Act. I quote the following portion of the McCollum opinion which is here particularly applicable:

"Only such laws and parts of laws as are in conflict with said Act, except as therein otherwise specially provided are repealed and the said Section specifically provides that nothing therein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor. ***

"The following excerpt from Section 51 of said Act further evidences this intention of the legislature as follows:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

"Finding no express repeal of Sections 4639 and 4713 of the 1923 Code, and there being no conflict with the Alabama Beverage Control Act, and further there being no intention of the legislature to repeal the existing prohibition laws of the State except as expressly done or by necessary implication, I am of the opinion that said Sections of the Code were not repealed by the Alabama Beverage Control Act, but that they still operate upon prohibited liquors as now defined by the provisions of the Alabama Beverage Control Act."

You are therefore advised that, in my opinion, Sections 4617, 4619, 4662, 4663 and 4671 of the 1923 Code of Alabama were not repealed by the adoption of the Alabama Beverage Control Act.

Replying to your second inquiry, you are advised that where the proprietor of a business establishment has obtained a retail liquor or beer license from the Alabama Alcoholic Beverage Control Board and the City of Gadsden and conducts only a retail business, in conformity with the Alabama Beverage Control Act, selling only State-stamped whiskies and beers, and such licenses have not been revoked, such business establishment would not fall within the categories designated as liquor nuisances by Section 4619. This section is as follows:

"4619. Liquor nuisances defined.—The following are declared to be common nuisances and may be designated as liquor nuisances: (1) Any rooms or structures used for the unlawful manufacture, sale, furnishing, distilling, rectifying, brewing, or keeping of **liquors or beverages that are prohibited by the laws of Alabama to be manufactured, sold or otherwise disposed of in this state**; (2) all houses, shops, or places where such **prohibited liquors and beverages**, or any of them are sold, bartered, exchanged, or otherwise disposed of to be drunk on or near the premises, or where such **prohibited** liquids, or beverages are kept for the purpose of sale or other disposition thereof in violation of law; (3) all places of resort where persons are permitted to resort for the purpose of drinking **such liquors or beverages** on or about the premises; (4) any **unlawful drinking place** that is kept or maintained in violation of the law of the state; (5) all restaurants, hotels and public eating places where the **prohibited liquors and beverages**, or any of them are sold or served for beverage purposes; (6) all places where business is carried on by a wholesale or retail dealer in liquors or by a wholesale or retail dealer in malt liquors, or by a brewer or distiller or rectifier of spirits **in violation of the law of the state**; (7), all warehouses or storage places where the **prohibited liquors and beverages**, or any of them, are kept or stored or received on consignment, or for distribution or delivery, contrary to the law of the state. The bill to be filed to abate such nuisances may be filed against any person, firm or corporation who maintains or aids in maintaining such nuisance, including agents, servants and employees, as well as officers of corporations." (Emphasis supplied)

You will note that each category is limited to "liquors or beverages that are prohibited by the laws of Alabama," or "prohibited liquors, liquids or beverages," or "unlawful drinking places," or "places where business is carried on * * * in violation of the law of the State," etc.

Inasmuch as, by the specific provisions of the Alabama Beverage Control Act (Section 51), the sale of licensed beer and whiskey by the licensees, in conformity with the Act, is made legal in "wet" counties, and inasmuch as Etowah County is such a "wet" county, it is my judgment, under the facts stated, that such establishment would not constitute a "liquor nuisance," as defined in Section 4619, supra.

Nothing said hereinabove should be so construed or interpreted to indicate that the operation of such an establishment could not be enjoined under Sec-

tions 9271, 9273, or abated under Sections 9280 et seq. of the Code of 1923, if the facts warranted such action.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 26, 1940.

Hon. Joe M. Bonner,
Deputy Solicitor,
Wilcox County,
Camden, Alabama.

Solicitors—Deputy Solicitors—

Deputy solicitor appointed under Section 5522 of the Code of Alabama, 1923, held not within the purview of Act No. 648, S. 444, approved July 10, 1940 requiring the county to provide suitable offices for the use and occupancy of certain solicitors and requiring the State of Alabama to furnish telephone service, stationery, stamps and other necessary equipment to certain solicitors.

Opinion by the Attorney General.

Dear Sir:

I have your letter of July 22, 1940, in which you request my opinion as follows:

"Under S. B. No. 44, Act No. 648, which was approved by the Governor on July 10, 1940, it is provided, among other things that 'the several counties of the State are hereby authorized, * * * to provide suitable offices for the use and occupancy by the circuit solicitors, deputy circuit solicitors, and assistant deputy circuit solicitors, in the county where such officer resides; * * * etc.' I am deputy solicitor for Wilcox County, Alabama.

"Please give me your opinion as to whether or not the provisions of this Act app'y to me as said Deputy Solicitor of said County in general, and specifically as to the provision relative to the furnishing of an office where there is no available space in the court house for an office."

I understand from your letter of inquiry that you are a "deputy solicitor" appointed by Hon. Joseph H. James, Solicitor of the Fourth Judicial Circuit of Alabama, under Section 5522 of the Code of Alabama, 1923, which reads as follows:

"5522. Deputy solicitors appointed; removal.—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit, to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

Act No. 648, S. 444, approved July 10, 1940, to which you refer in your letter of inquiry, provides in pertinent part:

"Section 1. That the several counties of the State are hereby authorized, and required to provide suitable offices for the use and occupancy by the circuit solicitors, deputy circuit solicitors, and assistant deputy circuit solicitors, in the county where such officers reside; and the State shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such offices and officers."

The answer to the question as to whether or not Wilcox County is required to provide suitable office space for your use and the State of Alabama is required to furnish telephone service, stationery, stamps, and other necessary equipment, depends upon whether or not you are a "deputy circuit solicitor", as that term is used in Act No. 648, *supra*.

In my opinion, the said act is not free from ambiguity in this regard for the reason that the statutory provision under which you are appointed refers to your office as "deputy solicitor" rather than as "deputy circuit solicitor", while other enactments of the Legislature have referred to another class of solicitors; namely, "deputy circuit solicitors" (Act No. 74, H. 177, approved March 31, 1936, General Acts, 1936, page 35).

I am cognizant of the fact that in the case of *State ex rel. Jones, et al. v. Stearns*, 200 Ala. 405, 76 So. 321, Mr. Justice Mayfield, speaking for the Supreme Court, uses the words "deputy solicitor" and "deputy circuit solicitor" interchangeably, in distinguishing between deputy solicitors appointed under the provisions of Section 5522, Code of Alabama, 1923 (Section 4 of the Act No. 720, S. 506, approved September 25, 1915, General Acts, 1915, page 817), and "county solicitors" elected under the terms of a local act.

In my opinion, however, this does not relieve Act No. 648, *supra*, of its ambiguity. There being a class of solicitors designated by statute as "deputy circuit solicitors", and there being a class of solicitors referred to by the Supreme Court as "deputy solicitors", though designated by the statute as "deputy solicitors", the intent of the Legislature in using the words "deputy circuit solicitors" in Act No. 648, *supra*, is not clear.

The language of the statute being ambiguous in this regard, it is necessary to attempt to arrive at the intention of the Legislature by resorting to the canons of statutory construction.

It is a familiar rule of statutory construction that where a statute is uncertain on its face, prior or contemporaneous statutes may be looked to in an effort to arrive at the intention of the Legislature, and this applies with peculiar force to statutes dealing with the same subject matter passed at the same session of the Legislature. *Marengo County v. Wilcox County*, 215 Ala. 640, 112 So. 243; *Tucker v. McLendon*, 210 Ala. 562, 98 So. 797. There is another rule of statutory construction that the purpose to be accomplished may be considered in arriving at the legislative intent. *Lynn v. Broyles Furniture Co.*, 3 Ala. App. 634, 57 So. 122.

With these rules of statutory construction in mind, I call your attention to Act No. 147, approved August 31, 1939 (General Acts, 1939, page 468), the pertinent part of which is as follows:

"Section 3. When any circuit solicitor, or deputy circuit solicitor or assistant deputy circuit solicitor, is ordered to prosecute any case or cases, or work with any Grand Jury, or discharge any other duty outside of the circuit for which he has been elected or appointed, he shall be entitled to his actual expenses for transportation, and not to exceed \$5.00 per day for hotel and meals to be rendered in an itemized account within ten days after his return home. Sworn to and returned to the Attorney General, and when approved by him, the Comptroller shall draw a warrant in favor of such circuit solicitor or deputy circuit solicitor, or assistant deputy circuit solicitor for such amount as thus approved. The several counties of the state are hereby authorized, directed, and required to provide suitable offices for the use and occupancy of such solicitors, deputy solicitors, and assistant deputy circuit solicitors in the counties where such officers reside, and the state shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such officers and offices."

Two opinions have been heretofore rendered by this office concerning the provisions of Section 3 of Act No. 329, *supra*.

On October 18, 1939, in an opinion to Hon. W. C. Hare, County Solicitor, Macon County, Tuskegee Alabama, Quarterly Report of Attorney General, Vol. XVII, page 99, this office held that the provisions of Section 3, *supra*, did not apply to deputy solicitors appointed under the provisions of Section 5522, *supra* inasmuch as such solicitors are paid entirely by the county, whereas, in the opinion of this office, Section 3 of Act No. 329, *supra*, applies only to those deputy circuit solicitors whose salary is paid in part by the State.

In an opinion rendered to Hon. Bart B. Chamberlain, Solicitor, 13th Judicial Circuit of Alabama, Mobile, Alabama, on November 23 1939, Quarterly Report of Attorney General, Vol. XVII, page 300, this office held that there was no way for the State to furnish telephone service, etc., to those solicitors entitled thereto because of the fact that no appropriation was made therefor. That opinion concluded as follows:

"Of course, the failure to make an appropriation for this purpose was no doubt an oversight on the part of the Legislature. It is our information that a bill is still pending in the Senate, which, if passed in June when the Legislature reconvenes, will remedy this situation."

The bill referred to in the above quoted excerpt from our opinion to Mr. Chamberlain was S. 444, which is now Act No. 648, supra. In my opinion, the sole purpose for which Act No. 648, supra, was passed was to cure this oversight on the part of the Legislature in failing to make an appropriation in Act No. 329 for the purpose of providing the solicitors therein dealt with with telephone service, etc.

As held in the opinion to Mr. Hare, supra, Act No. 329, supra, did not apply to deputy solicitors appointed under the provisions of Section 5522, supra, but rather to deputy circuit solicitors, a part of whose salary is paid by the State of Alabama. The premises considered, it is my opinion that the term "deputy circuit solicitors" used in Act No. 648, supra, refers to the same class of deputy circuit solicitors dealt with in Act No. 329, supra, and does not refer to or include deputy solicitors appointed under the provisions of Section 5522, supra.

Consequently, it is my opinion that under the terms of Act No. 648, supra, the county is not required to furnish a deputy solicitor appointed under the terms of Section 5522, supra, with necessary office space, and the State is not required to furnish such deputy solicitor with telephone service, stationery, stamps and other necessary equipment.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 26, 1940.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Pell City, Alabama.

Constitutionality — Statutes —

Act No. 606, H. 648, approved July 10, 1940, does not violate Section 21 of the Constitution of Alabama of 1901.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 19, 1940, in which you request my opinion as follows:

"As Judge of Probate of St. Clair County, and as ex-officio principal Judge of the Court of County Commissioners, I respectfully request your official opinion as to the constitutionality of House Bill 648—McCord, approved July 10, 1940, especially as the same effects the pay-

ment of the portion of the salary of the Chief Clerk provided for in that Act by St. Clair County, which is divided into two judicial divisions and has a population of less than 60,000.

"I might also state that St. Clair County is a part of the 16th Judicial Circuit and if the Act is constitutional, the same applies to this County.

"Some question has been raised as to whether or not the provisions of Section 4 of the Act (which does not apply to St. Clair County) are in conflict with Section 21 of the Constitution of Alabama. It has been suggested that if Section 4 is declared unconstitutional, it will not affect the rest of the Act and as to this I would like to be advised."

Section 21 of the Constitution of Alabama, 1901, provides as follows:

"That no power of suspending laws shall be exercised except by the Legislature."

Section 4 of Act No. 606, H. 648, approved July 10, 1940, provides:

"The board of revenue or other governing body of the county paying the larger portion of the salary named in this act may from time to time suspend the operation of this act in such circuit and during such periods of suspension this act shall not be operative or effective, and the term of office provided for in Section 3 of this act shall at all times be subject to the provisions of this section."

An analogous situation was presented in the case of **Dearborn vs. Johnson**, 234 Ala. 84, 173 So. 64, wherein the provision of an act authorizing the County Commission of Jefferson County, on written request of the tax assessor, to suspend the operation of the act for not exceeding one year, was held by the Supreme Court not to violate Section 21 of the Constitution of 1901. the Court saying:

"Here the Legislature fixed the effective date of the act, and the same body prescribed the method of an extension of its effective date through the governing body of the county acting as legislative agents in this respect. We are clear to the view there is here no violation of section 21 of our Constitution."

I have examined Act No. 606, H. 648, approved July 10, 1940, and I am of the opinion that Section 4 of said Act does not violate Section 21 of the Constitution of Alabama, 1901.

Hand et al. vs. Stapleton, et al., 135 Ala. 156, 33 So. 689; **McCrilless vs. Tennessee Valley Bank**, 208 Ala. 414, 94 So. 722; **Dearborn vs. Johnson**, *supra*.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 26, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
THE CAPITOL.

Monroe County — Judge of Probate — Court of County Commissioners — Board of Equalization —

1. Judge of Probate of Monroe County entitled to receive additional compensation for service rendered to Commissioners Court during his term of office, if additional duties are placed upon him.

2. Court of County Commissioners does not have authority to employ and pay someone to act as clerk of the Board of Equalization.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of August 2, 1940 follows:

"Please refer to Act 211, page 109, General and Local Acts of 1939, and advise me in answer to the following:

"1. Under the provisions of Section 5 is the present Probate Judge of Monroe County entitled to receive nine hundred (\$900.00) dollars per annum during his current term of office?

"2. Is the Probate Judge entitled to collect, either during his present or his future term, the nine hundred (\$900.00) dollars mentioned above and also the four hundred (\$400.00) dollars ex-officio fees provided in Section 3802 of the 1923 Code?

"3. In view of the general law which requires the Tax Assessor to act as clerk to the various county Boards of Equalization, does the County Commission of Monroe County have the legal authority, as indicated in the above local act, to employ someone to act as Clerk for the Board of Equalization, and, if so, would there be any time limitations on such employment?"

Since you ask in your first inquiry whether or not the probate judge of Monroe County will be entitled to the \$900.00 per annum mentioned therein during his current term of office, and do not make any specific constitutional objection in regard to the Act, this opinion, in so far as the constitutionality of Act No. 211, *infra*, is concerned, will only deal with Section 281 of the Constitution of 1901.

My answer to your first inquiry is in the affirmative.

The act to which you refer in the above request is Act No. 211, H. 390, page 109, Local Act 1939 which act became a law under the provisions of Section 125 of the Constitution of 1901.

Section 5 of Act No. 211, supra, reads in pertinent part as follows:

" * * * The Probate Judge of Monroe County, Alabama, as President of said County Commission, shall be paid for his services under this Act the sum of \$900.00 per annum, payable in monthly installments of \$75.00 each, on the first day of each calendar month."

The question now presents itself as to whether or not the above quoted portion of Section 5 of Act No. 211, supra, is offensive to Section 281 of the Constitution of 1901, which reads as follows:

"Section 281. The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Supreme Court of this State in the case of **Taylor v. Davis**, 212 Ala. 282, 102 So. 433, held that the salary of officers coming within the provisions of Section 281 of the Constitution could be increased during their term of office if there were additional duties required of said officers at the time of the increase in their salaries. See also **Morgan County et al. v. Edmondson**, 238 Ala. 522, 192 So. 274; **Quarterly Report, Attorney General**, Vol. XVIII, page 324.

The question now arises as to whether or not additional duties were placed upon the Probate Judge of Monroe County by Act No. 211, supra.

It is my opinion that sufficient additional duties are imposed upon the probate judge by section 7 of Act No. 211 to take him out from under the operation of Section 281 of the Constitution.

My answer to your second inquiry is in the affirmative.

Section 3802 of the Code of 1923 prescribes the salary of the Judge of Probate for his services as Judge of the County Court. The Act under consideration does not in any way attempt to deal with the duties of the Probate Judge as Judge of the County Court. In other words, Section 3802 and Act No. 211, supra, are two separate and distinct enactments of the Legislature, both having a separate and distinct field of operation.

It is, therefore, my opinion that the Judge of Probate of Monroe County would be entitled to receive the \$400.00 (Monroe County coming within the population classification as set out in Section 3802) per annum as provided by Section 3802, and also \$900.00 per annum as provided by Section 5 of Act No. 211, supra.

My answer to your third inquiry is in the negative.

I find no authority in the Act under consideration for the County Commission to employ a person to act as clerk of the Board of Equalization. The only semblance of such authority is found in Section 6 of Act No. 211, supra, wherein it is provided that the "commission shall also have authority to employ competent stenographers for the purpose of taking evidence submitted before the Board of Revenue, or any like authority that may be established by the State of Alabama for the purpose of equalizing or adjusting taxes of the taxpayers of Monroe County." This authority to employ a stenographer for the purpose of taking testimony submitted before the Board of Equalization could not, in my opinion, be stretched to the extent of employing a clerk for such Board.

Aside from the above, the Legislature in Section VIII of Act No. 143, S. 14, approved March 15, 1939, page 178, General Acts 1939, which act creates Board of Equalization for the several counties of the State, has clearly indicated and expressed a clear and definite intent that the clerks or secretaries of the Boards of Equalization shall serve without compensation or expenses to the various counties of the State. Said Section VIII reads as follows:

"Section VIII. The County Tax Assessor shall be and serve as the Secretary of the County Board of Equalization but shall not receive any compensation for his services as such but have no vote nor voice in the government or business of said Board except as hereinabove provided."

In view of the lack of authority in Act No. 211, supra, for the commission to employ a clerk for the Board of Equalization and in view of the language used in Section VIII of Act No. 143, supra, you are advised that in my opinion the County Commission may not employ a person to serve as clerk of the Board of Equalization.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 26, 1940.

Hon. S. G. Stephenson, Clerk,
Municipal Court of Bessemer,
Bessemer, Alabama.

Process — Authority to direct execution of — The Clerk, and not the Judge of the Municipal Court of Bessemer, has the authority to direct what officer or officers shall serve civil processes emanating from said court.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion dated August 2, 1940 follows:

"I, as Clerk of the Municipal Court of Bessemer, am writing for your opinion on the following questions and I am attaching hereto an order by the Judge of this Court directed to me with reference to the distribution of papers to be served by the Constables of this Court.

"For your information I will state that each and every summons and writ of garnishment filed in the Municipal Court of Bessemer is issued by me and under section 6799 of the Code of Alabama of 1923 it is provided that the Constables shall execute and return all summons, execution, and other process to him directed by any lawful authority. And under the act creating the Municipal Court of Bessemer, (Local Acts 1927, page 56, Section 5) provides as follows: 'That the Judge of said court shall determine what officer or officers shall execute any criminal process issued by said court or the judge thereof.' The act is silent as to who shall direct the serving of summons and writs of garnishment or other civil process. M

"Question One — Am I bound by the order of the Judge hereto attached governing the distribution of summons and writs of garnishments issued by me?

"Question Two — Have I the right to distribute the summons and writs of garnishments issued by me to any Constable or the Sheriff who has the authority to execute the same."

The order of the Judge of the Municipal Court of Bessemer which you enclosed with your letter of inquiry attempts to designate just what civil processes emanating from the Municipal Court of Bessemer shall be served by each of the two constables authorized to execute the processes of said court, that is, the constables of precincts 2 and 33.

Succinctly stated, the legal proposition for determination is: Where there is more than one officer with the authority to execute the processes of a court, and the statute is silent as to who shall determine what officer shall execute particular processes, who has the authority to determine the officer to execute each particular process — the judge of the court or the clerk of the court?

The Municipal Court of Bessemer was created by Act No. 140, S. 46, approved July 7, 1927 (Local Acts 1927, page 54). Section 5 thereof contains the provisions pertinent to the instant inquiry, and reads as follows:

"Section 5. That the clerk of said court shall issue all processes out of said court, except warrants of arrest and writs of commitment which shall be issued by the judge of said court; the clerk shall approve all bonds in all cases; shall keep a docket of said court; shall certify all appeals and certioraries; but all judgments when required to be signed, shall be signed by the judge. The fees and costs now allowed to justices of the peace in said Jefferson County, shall be taxed and collected as now provided by law in such cases, or as may be hereafter provided by law in such cases, except as hereinafter provided for, and shall by the clerk of said court be paid into the county treasury. The constable of said precincts (2 and 33), and the sheriff of said county, shall be the officers of said court, and shall execute all processes from said court, and make due return thereof; and for their compensation shall receive

the same fees as now provided by law for like services in the courts of justices of the peace in Jefferson County, which said fees shall be paid to the constables and sheriff and not into the county treasury. **That the judge of said court shall determine what officer or officers shall execute any criminal process issued by said court or the judge thereof.**" (Emphasis supplied).

It will be noted from the above quoted section of the act, and especially the emphasized portions thereof, that:

1. The clerk of said court issues all processes out of said court, except warrants of arrest and writs of commitment which are issued by the judge of said court;
2. The constables of precincts 2 and 33 and the sheriff of Jefferson County are the officers of the court charged with the duty of executing all processes emanating therefrom;
3. The judge of said court determines which of these officers shall execute any criminal process issued by said court or the judge thereof.

A most careful examination of the statutory and case law of this State, as well as of reference works and digests, fails to disclose any direct authority on the proposition with which we are instantly concerned.

Consequently, since the Legislature has seen fit to specifically designate the judge of the Municipal Court of Bessemer to determine what officer or officers shall execute any criminal process issuing from said court, and the statute is silent as to who shall determine what officer or officers shall execute civil processes emanating therefrom, it is my opinion that the known legal maxim that the inclusion of one operates to the exclusion of all others applies and negatives the contention that the judge of said court has the authority to determine what officer or officers shall execute civil processes emanating from said court. In my judgment, when the Legislature dealt with this matter in regard to criminal processes and invested the judge of said court with authority to determine what officer or officers should execute criminal processes, it would have also invested the judge of said court with the authority to determine what officer or officers should execute civil processes emanating therefrom if it had intended that the judge of said court be invested with that authority. Since the Legislature failed to do this, it is my opinion that the ~~clerk of the said court who issues all civil processes~~, is the one invested with authority to determine what officer or officers shall execute the same. This, in my judgment, is in accordance with the legislative intent, and the legislative intent when ascertained is the law itself. **City of Birmingham v. Sou. Express Co.**, 164 Ala. 529, 51 So. 159.

It has been suggested that the case of **Woods vs. Wood** 219 Ala. 523, 122 So. 835, is authority for holding that the Judge of the Municipal Court of Bessemer, rather than the Clerk, of said court, has the authority to determine what officer shall execute the civil processes emanating from said court; but I have carefully read the opinion of the Supreme Court in said case and do not consider it as authority pro or con on the instant proposition. The act under consideration in that case set up the Gadsden Inferior Court in lieu of Justices of the Peace Courts in certain precincts in Etowah

County, and the judge of said court acted both as judge and clerk, there being no clerk provided for said court, whereas the act creating the Municipal Court of Bessemer provided for a clerk of said court as well as a judge, and fixed the clerk's duties, which duties, so far as here pertinent, are set out in Section 5, supra.

However, said case is authority for the proposition that the official invested with the power of determining what officer or officers shall execute processes, may not arbitrarily exercise said power to the exclusion of one or more of the officers empowered to execute such processes. Applying the rule there laid down to the instant situation, it is authority for advising you that in delivering the civil processes of the Municipal Court of Bessemer for execution, you may not arbitrarily discriminate in favor of either of the constables who are officers of said court or the sheriff of Jefferson County, but you should turn over to each for execution the civil processes of the court which in your fair judgment he is qualified, ready and able to execute promptly and effectively, and that they should be in fair and reasonable proportion.))

The case of *Jeter v. State*, 218 Ala. 12, 117 So. 460, which is cited in the Woods case, supra, deals with the act creating the Birmingham Municipal Court, which act provided for a clerk of said court as well as a judge, which clerk was invested with the same authority in regard to the issuance of processes as is invested in you. Each of these cases was a mandamus proceeding by a constable to compel the turning over of certain processes to him, and it is interesting to note that in the Jeter case, where there was both a judge and clerk of the court, the mandamus was directed against the clerk, and not the judge, whereas in the Woods case, there being only a judge of the court and no clerk, the mandamus was directed against the judge. Since no point was raised in the Jeter case in regard to the mandamus proceeding being directed against the proper officer, it might be inferred therefrom that the clerk of the court, and not the judge, in the absence of a statutory provision in regard thereto, was invested with the authority to determine what officer or officers should execute the processes of the court.

Specifically answering your questions, you are advised:

(1) In my opinion, you are not bound by the order of the judge of the Municipal Court of Bessemer, enclosed in your letter of inquiry, attempting to direct how you should distribute summonses and writs of garnishment issued by you.

(2) You have the right to distribute summonses and writs of garnishment issued by you (civil processes) to either of the constables who are officers of the said court with authority to execute the same (constables of precincts 2 and 33) or to the sheriff of Jefferson County, subject to the limitation laid down in the Woods case, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 27, 1940.

Hon. T. B. Pearson,
County Supt. of Education,
Washington County,
Chatom, Alabama.

County Superintendent of Education — County Board of Education — School Transportation routes —

1. The establishment or change of school transportation routes, to be effective, must be recommended by the County Superintendent of Education and approved and concurred in by the County Board of Education.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of August 21, 1940 follows:

"Kindly advise if boards of education may legally establish school transportation routes without the recommendation of the county superintendent. Also advise if county boards of education may legally change transportation routes that have already been established if the county superintendent recommends that no change be made."

It is my opinion that your first inquiry should be answered in the negative.

Attention is first called to Sections 100 and 157 of the School Code of 1927. Said elections are, respectively, as follows:

"100. Consolidation of School's. — The County Board of Education shall consolidate schools wherever in its judgment it is practicable, and arrange, if necessary for the transportation of pupils to and from such consolidated schools. But no school's shall be consolidated, by consolidating two or more schools located in different school districts, without the consent of the school trustees of each district."

"Section 157. Consolidated Schools, Plans for. — The County Superintendent of Education, subject to the provisions of this Code, shall work out plans for the consolidation of schools, and for the grounds, buildings, and equipment of such consolidated schools, and submit the same for approval and adoption by the County Board of Education."

Also attention is called to Section 151 of the School Code, supra, which is as follows:

"151. Location of school Buildings. — The County Superintendent of Education, subject to the provisions of this Code, shall recommend for approval and adoption by the County Board of Education, the kind, grade and location of schools to be established and maintained, and the compulsory school attendance districts to be established."

It will be noted from a reading of the above quoted sections that in the matters of the location and consolidation of schools, action by the County Superintendent of Education and the County Board of Education, to be effective, must be concurring and any action on the part of either, without the concurring action of the other, is ineffective. (See opinion to Hon. Geo. E. Pass, Chairman, Board of Education, Blount County, Oneonta, Alabama, dated December 6, 1938, Quarterly Report of Attorney General, Vol. XIII, p. 95). It therefore follows and is my opinion, inasmuch as the establishment of school transportation routes are incidental to and an outgrowth of the location and consolidation of schools, that the establishment of such routes, to be effective, must be recommended by the County Superintendent of Education and concurred in by him and the County Board of Education.

In reference to your second inquiry, it is my opinion that the conclusion hereinabove reached in answer to your first inquiry, is applicable; that is, before a school transportation route can be legally changed, the same must be concurred in by both the County Superintendent of Education and the County Board of Education.

In my judgment, the establishing or changing of a school transportation route is a matter which seriously affects the educational interests of a county and, therefore, if a dispute arises between a county superintendent of education and a county board of education with reference to the same, then under the provisions of Section 71 of the School Code, 1927, the State Superintendent of Education would have the power to determine from the facts the just and proper disposition of the matter. Section 71, *supra*, is as follows:

"71. County and City Boards of Education's Action Reviewed.—The State Superintendent of Education under rules and regulations promulgated by the State Board of Education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the State Superintendent of Education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the State Superintendent shall be binding."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 27, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Alabama Polytechnic Institute — Farm and Home Demonstration Agents — Extension Department.

The Extension Department of the Alabama Polytechnic Institute in the discretion of the Board of Trustees of said institution is authorized to furnish the Farm and Home Demonstration Agents with brief cases and fountain pen desk sets.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of August 10, 1940 follows:

"Please advise me in answer to the following question:

"Can the Extension Department of the Alabama Polytechnic Institute furnish Farm and Home Demonstration Agents brief cases and fountain pen desk sets, as necessary equipment in the discharge of their official duties?

"Inasmuch as we are now making an examination of the Alabama Polytechnic Institute, and need your advice on the above matter in connection with this work I would very much appreciate your giving this request early attention."

My answer to your inquiry is in the affirmative.

The act of the Federal government which sets up the Cooperative Extension Service is commonly known as the Smith-Lever Act, and was passed on May 8, 1914. This act is found in U. S. C. A. Title 7, Sections 341-348 inclusive. This act sets up and establishes farm demonstration agencies in cooperation with the several states of the United States.

There are adequate appropriations contained in Sections 343, 343a., 343b., 343c., and 343d. The only restriction placed on the various agricultural colleges of the State in expending the money appropriated by the Federal Government is found in Section 345 of the Smith-Lever Act. This section reads in pertinent part as follows:

"345. * * * and no portion of said moneys shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings, or the purchase or rental of land, or in college-course teaching, lectures in colleges, promoting agricultural trains, or any other purpose not specified in sections 341 to 348, inclusive, of this chapter, * * *."

I call your attention to Section 9 of Act No. 239, S. 238, approved August 22, 1939, page 399, General Acts, 1939, which section reads as follows:

"Section 9. ALABAMA POLYTECHNIC INSTITUTE FOR EXTENSION WORK IN AGRICULTURE AND HOME ECONOMICS. (a) That, in order to aid in diffusing among the people of Alabama in the several Counties thereof, useful and practical information on subjects relating to Agriculture and home economics; to provide for the continuance and improvement of farm and home demonstration work; to provide for the training of men and women leaders; to provide for organizing clubs of farm people, including men, women, boys, and girls; for the improvement of agriculture and farm home life; to promote the welfare of the rural districts by other forms of extension work in agriculture and home economics; and to aid in securing for expenditure in Alabama the full amounts of Federal funds appropriated conditionally to Alabama by the Congress of the United States, under an Act approved May 8, 1914, and generally known as the Smith-Lever Act for Extension Work in Agriculture and Home Economics and other supplementary and related Acts for Extension Work in Agriculture and Home Economics, there is hereby appropriated to the Alabama Polytechnic Institute out of the State Treasury for each of the fiscal years ending September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, the sum of \$220,000.00 (b) That the funds appropriated in this section shall be expended under the general direction of the Board of Trustees of the Alabama Polytechnic Institute, through its Extension Service, **for paying any and all bills and other items in carrying out the aims and purposes of this Act** and in such manner as to aid in securing for Extension Work in Alabama in any year the maximum amounts of all Federal funds conditionally appropriated for that year by an Act of Congress of the United States approved May 8, 1914, and generally known as the Smith-Lever Act for Extension Work in Agriculture and Home Economics, and other Federal Acts supplementary and related thereto."

It will be noted from the underscored portion of the above quoted section that the Board of Trustees of the Alabama Polytechnic Institute, through its Extension Service, may pay any and all bills and other items of costs in carrying out the aims and purposes of the Smith-Lever Act.

You are therefore, advised that in my opinion if the Board of Trustees of the Alabama Polytechnic Institute determine that it is necessary to expend these funds for the purposes mentioned in your request to properly carry out the aims and purposes of the Smith-Lever Act, they would be authorized to purchase the brief cases and fountain pen desk sets mentioned in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 28, 1940.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Deed Filing Tax — Delaware Corporation —

1. Provision in statute of Delaware whereby upon merger of two Delaware corporations, one of which holds all the capital stock of the other, title passes from the latter to the former as to all property held by the latter, ineffectual as to real property in Alabama alleged to be so conveyed.

2. Quitclaim deed in such circumstances from the one corporation to the other, alleged to be executed to protect the record title in Alabama, reciting a nominal consideration, is subject to the privilege tax imposed upon the record of deeds. Rev. Acts 1935, Section 348, Schedule 46 (Gen. Acts 1935, p. 456).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of August 17, 1940 follows:

"Enclosed please find letter which was written to me by C. A. L. Johnstone Jr., of the law firm of Messrs. McCorvey, McLeod, Turner & Rogers, which I am sure is self-explanatory.

"Will you please render me an opinion at your earliest convenience."

From the aforementioned letter, it appears that:

"One corporation organized under the laws of Delaware owns all of the capital stock of another corporation also organized under the laws of Delaware. The subsidiary corporation is being merged into the parent corporation under the provisions of Section 59 A of the Delaware Corporation Law. Under the provisions of this section, when the merger is completed, the merger itself has the effect of vesting in the parent corporation all of the estate, property, rights, privileges, and franchises of the subsidiary as fully and as entirely and without change or diminution as the same were before held and enjoyed by such subsidiary corporation. The subsidiary corporation owns certain real property in Mobile County which will be affected by this merger and in order to perfect the record of the title vested in the parent corporation by such merger, the subsidiary corporation will execute a quitclaim deed to the parent corporation, reciting the facts of the merger, the vesting in the parent corporation under the merger and that the deed is being given merely for the purpose of perfecting the title in the name of the corporation." (Emphasis ours).

It is contended that by reason of the law of Delaware, as indicated by the underscored part of the above extract from the letter, title to Alabama

real estate now held by the subsidiary corporation will, upon merger under Delaware law, vest in the parent corporation; and that any quitclaim deed by the former corporation to the latter corporation, when offered for record in Alabama is within the exception noted in Schedule 46 of Section 348 of the Revenue Act of 1935 (Gen. Acts, 1935, page 456) as a deed or instrument "executed for a nominal consideration for the purpose of perfecting the title to real estate," and therefore not subject to the deed filing tax imposed by said Schedule 46.

The vice of the argument is that it ignores the elemental principle of law that title to real property vests, or is divested only in accordance with the law of its situs.

"The exclusive jurisdiction which each sovereignty possesses over land within its borders requires that its acquisition, transfer, and devolution be governed by the law of its situs. * * * The principle of comity does not require a state to regard the laws of any other state, so far as they may affect contracts in relation to real estate situated in the former state." 12 C. J. 477-8.

"It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." U. S. v. Fox, 94 U. S. 315, 24 L. ed. 192.

As the Delaware statute is ineffectual to pass title to Alabama real estate, therefore, execution by one corporation to another of a quitclaim deed, for record in Alabama, conveying property in which the grantee had no title whatever prior to such conveyance, can hardly be said to be "for the purpose of perfecting the title." Prior to conveyance, there was no title in the grantee to be perfected. The quitclaim will be as effectual to pass title as a deed with covenants of warranty and seizin. The recital of a nominal consideration for the conveyance is likewise immaterial. The measure of the deed filing tax, under Schedule 46, supra, is the actual value of the interest or title conveyed.

In *Hawkins, Probate Judge v. Pure Oil Co.*, 232 Ala. 660, 169 So. 307, it was held, as expressed in the headnote:

"Deed to all property of dissolved oil company to company which had acquired all stock of such dissolved company could not be recorded without payment of filing tax, since legal title was being acquired by grantee company, and hence deed was not within exception permitting filing without tax where purpose is perfecting title. * * *"

In that case it was observed:

"If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable, as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devisee. See Biennial Report of Attorney General 1926-28, p. 42."

Learned counsel attempt to distinguish the Pure Oil Case, *supra*, from the situation here involved, on the theory that in that case dissolution of one corporation did not *ipso facto* vest title to its property in another corporation holding all the capital stock of the dissolved corporation; whereas (they say) merger under Delaware law of the parent corporation with its subsidiary does vest legal title in the parent and divest it in the subsidiary, and the record of a deed is necessary only to perfect title, and is not necessary to convey title.

The fallacy, as we have shown, is that such merger under the Delaware corporation statute is utterly ineffectual to pass or convey title to Alabama real estate. There is no Alabama statute to that effect, and title to Alabama real estate passes only upon compliance with or pursuant to Alabama law. Title to real estate in Alabama passes, so far as we are informed, by deed devise, or descent, or by judicial decree in some instances, and not otherwise, except in case of merger of Alabama corporations. Code, 1923, Secs. 7039-7041. Cf. *State v. Atlantic Coast Line R. R. Co.*, 202 Ala. 558, 81 So. 60.

I am of opinion therefore that the deed filing tax must be paid upon offer for record of a quitclaim deed conveying real estate in Alabama from one Delaware corporation to another, although upon merger under Delaware law of the two corporations, such merger, without more, passes title from one to the other of all property held by the merged corporations.

See also Office Edition, Opinions of Attorney General, Vol. 2A, p. 134, to Hon. E. W. Long, Probate Judge Walker County, February 12, 1935; Quarterly Report, Attorney General, Vol. XVIII, p. 150.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 28, 1940.

Hon. J. Bruce Henderson, Senator,
22nd Senatorial District,
Miller's Ferry, Alabama.

Statutes — Act No. 368, H. 125, approved September 13, 1939, General Acts, 1939, page 487, known as "The Local Option Stock Law for the State of Alabama with the County as the Unit" —

1. Effect of election held in any county in Alabama under the provisions of Section 15 of said act before March 1, 1941, at which a majority of the qualified electors participating therein vote in favor of cows, calves, yearlings, bulls and oxen running at large in said county is to preserve the status quo in said county in regard to cows, calves, yearlings, bulls and oxen running at large therein after March 1, 1941.

2. All stock laws which prohibit the running at large of cows, calves, yearlings, bulls and oxen in any particular districts or precincts in a county are not repealed but continue in full force and effect after March 1, 1941, even though an election is held in said county under the provisions of Section 15 of said act prior to March 1, 1941, at which a majority of the electors participating therein vote in favor of cows, calves, yearlings, bulls and oxen running at large within the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 23, 1940, in which you request my opinion as follows:

"I shall thank you for your official opinion on the following question:

"If an election is held in Wilcox County between now and March 1, 1941, under the provisions of Section 15 of Act No. 368, H. 125, approved September 13, 1939, General Acts, 1939, page 487, known as 'The Local Option Stock Law for the State of Alabama with the County as the Unit', and a majority of the qualified electors of Wilcox County participating therein vote in favor of cows, calves, yearlings, bulls and oxen running at large within such county, will the same status in regard to the running at large of cows, calves, yearlings, bulls and oxen in Wilcox County which prevailed on or before September 13, 1939, prevail on and after March 1, 1941?"

"In other words, in such an event, will the stock laws that prevailed in various districts or precincts in Wilcox County on September 13, 1939, in so far as the same pertain to cows, calves, yearlings, bulls and oxen continue in full force and effect after March 1, 1941?"

This office rendered an opinion dealing with this general subject to Hon. Frank J. Mizell Jr., Circuit Solicitor, Andalusia, Alabama, under date of February 28, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 277, from which I quote in extenso:

"The Local Option Stock Law for the State of Alabama with the County as the Unit' is Act No. 368, H. 125, approved September 13, 1939 (General Acts, 1939, p. 487).

"While Section 18 of said act provides for it to become effective upon its approval by the Governor, your attention is called to the first sentence of Section 15 thereof, which reads as follows:

"On and after March 1, 1941, it shall be unlawful for horses, mares, mules, jacks, jennies, colts, cows, yearlings, bull, oxen, sheep, goats lambs, kids, hogs, shoats and pigs to go at large in any county of the State of Alabama."

"Thus it can be seen that the prohibition contained in said act against all of the livestock enumerated therein from running at large in any county of the State of Alabama is not effective until on and after March 1, 1941.

"The remainder of said Section 15 and Section 15½ thereof read as follows:

"Section 15. * * * An election may be held, however, in the manner hereinafter prescribed in any county in the State of Alabama after the passage of this enactment and its approval by the Governor to determine the sentiment of the voters of each such county as to whether cows, calves, yearlings, oxen and bulls may go at large in each such county. Upon a petition of 25% of the number of qualified electors voting in such county in the last preceding general election being filed with the Probate Judge of any county, the said Probate Judge of such county must call an election to determine the sentiment of the people as to whether or not cows, calves, yearlings, oxen and bull's may go at large in said county. The first said election for the determination of this question may be held in any county at any time after the effective date of this Act. The appointment of officers to hold any such election shall be made in the same manner as appointments to conduct other elections. Provided, if the election is held at the same time of a primary or general election the officers appointed for such primary or general election shall hold the election hereunder. Subject to the above limitations, said election, or any election held under the terms of this enactment, shall be held within not less than 30 days nor more than 45 days from the date of filing said petition, and notice thereof shall be given by the Probate Judge by publication at least three weeks before the date of said election in a newspaper published in such county, or if there be none, by posting such notice at the Court House door of said county apprising the voters of the county that an election will be held in the several precincts thereof to determine whether such county shall be controlled in its entirety by this enactment or whether in such county cows, calves, yearlings, oxen and bulls may be permitted to go at large. The cost of the publication of the notice and the cost of said election shall be paid out of the general funds of the County. On the ballot to be used for such election the question shall be in the following form: 'Do you oppose the running at large within this county of cows, calves, yearlings, bulls and oxen, in accordance with the provisions of the Local Option Stock Law for the State of Alabama with the County as the unit? Yes—— No——.' Only qualified electors shall vote in said election. If a majority of the electors voting in said election vote 'Yes' then it shall be unlawful for cows, calves, yearlings, oxen and bulls to run at large in said county until said county shall in a subsequent election held under this Act indicate that it wishes cows, calves, yearlings, oxen and bulls to go at large. If a majority of the electors voting in said election vote 'No', said county shall be an 'Open Range County' under the terms of this Act until it shall, by a subsequent election held under this Act, vote that it shall be unlawful for cows, calves, yearlings, bulls and oxen to go at large in said county. After one such election there can be no other election for such purpose held in such county within two years, and thereafter no additional election may be held within two years from the date of the last prior election. For the purpose of this Act, the term 'Stock Law County'

shall mean any county which does not vote 'Open Range', and the term 'Open Range County' shall be understood to mean any county which by a majority of those voting, may direct that it shall be lawful for cows, calves, yearlings, oxen and bulls to go at large in such county. In all 'Open Range Counties' or 'Stock Law Counties' as herein defined, if any horse, mare, mule, jack, jenny, colt, cow, calf, yearling, bull, oxen, sheep goat, lamb, kid, hog, shoat, or pig be injured or killed while at large on any public highway, no liability for the injury to or death of such animal shall attach to the owner or operator of any vehicle of any kind causing the injury or death, unless it be shown that such injury or death was the result of wilful or wanton conduct of the operator of the vehicle.'

"Section 15-½. If any county shall have one or more stock law districts in which cows, calves, yearlings, bulls and oxen are prohibited from running at large, but less than the whole county under such stock law, at the time this Act is passed and approved, then an election held hereunder at which the vote is in favor of cows, calves, yearlings, bulls and oxen running at large shall not repeal any such stock law in such stock law district or districts existing at the time of the passage and approval of this Act.' * * *

"It is to be noted that in the election provided for in Section 15, supra, the qualified electors of a county are only given an opportunity to vote on the subject of whether or not they oppose the running at large within the county of 'cows calves, yearlings, bulls and oxen.' They are not given the opportunity of voting on the question of whether or not they oppose the running at large within the county of any other livestock enumerated in said section.

"It seems very clear from the provisions of Section 15, supra, and Section 15½, supra, that the only effect of an election held pursuant to the provisions of Section 15, supra, in any county in Alabama at which the majority of the qualified electors participating therein vote in favor of 'cows, calves, yearlings, bulls and oxen' running at large in said county is to prevent the prohibition contained in said act against 'cows, calves, yearlings, bulls and oxen' running at large in any county in Alabama from becoming effective on and after March 1, 1941, in those precincts or districts in such county which did not have a stock law at the time of the passage of said act. Even in such a county, i. e., in a county in which an election is held pursuant to the provisions of Section 15, supra at which a majority of the qualified electors participating therein vote in favor of 'cows, calves, yearlings, bulls and oxen' running at large in such county, none of the livestock enumerated in said act, including 'cows, calves, yearlings, bulls and oxen' may run at large on and after March 1, 1941, in those precincts or districts in such county which had a stock law at the time of the passage of said act."

Applying the above to your specific inquiries in regard to Wilcox County, you are advised:

1. If an election is held in Wilcox County between now and March 1, 1941, under the provisions of Section 15 of Act No. 368, supra, and a majority of the qualified electors of Wilcox County participating therein vote in favor of cows, calves, yearlings, bulls and oxen running at large in said

county, the same status that prevailed in Wilcox County on September 13, 1939, the effective date of Act No. 368, supra, in regard to the running at large of cows, calves, yearlings, bulls and oxen will continue to prevail on and after March 1, 1941.

2. All stock laws which prohibit the running at large of cows, calves, yearlings, bulls and oxen in any particular districts or precincts in Wilcox County will not be repealed, but will continue in full force and effect on and after March 1, 1941, even though an election is held in said county under the provisions of Section 15 of said act prior to March 1, 1941, at which a majority of the electors participating therein vote in favor of cows, calves, yearlings, bulls and oxen running at large within the county.

This is in accordance with the plain, clear and unambiguous language of Section 15½, supra. When the language of a statute is plain, clear and unambiguous, there is no room for construction. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 29, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Department of Revenue,
Capitol.

Tax Sales — Sale of lands bid in by State at tax sales — State Land Commissioner — Commissioner of Revenue.

Sale by State of lands bid in by State at sale for unpaid taxes, after three years from date of such sales, by State Land Commissioner under Sections 279, 280 and 282 of Revenue Act of 1935, for less than amount of taxes due thereon when bid in by State, is void, and title to such lands remains vested in the State. (Gen. Acts 1935, p. 373-4, Sections 279, 280, 282).

Commissioner of Revenue, as State Land Commissioner, in such case, entitled to sue in ejectment to recover possession of said lands, pursuant to Section 251 of the Revenue Code of 1935. (Gen. Acts 1939, p. 3), (Gen. Acts 1935, p. 363), as amended (Gen. Acts 1935, p. 1112)

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of July 30, 1940 follows:

"Certain property in Jefferson County, Alabama, was assessed in the name of Mrs. S. M. Clapp for the years 1929, 1930, 1931, and 1932. On November 20, 1933, this property was offered for sale for ad valorem taxes and bid in by the State for the tax years 1929, 1930, and 1931. On the same day the property was again offered for sale for the taxes for the year 1932 and again the property was bid in by the State.

"On March 15, 1937, Florence Morgan Shelton purchased this property from the State Land Commissioner, for which she paid \$142.38. This amount was determined by computing the amount of taxes due for the year 1932 together with the costs and expenses incurred in the sale of this property for the taxes for that year. To this sum was added an amount equivalent to the taxes for the years 1933, 1934, 1935, 1936 and 1937. The deed was executed by the State Land Commissioner and approved by the Governor. The deed recites the decree of sale for the taxes for the year 1932 and the sale by the Tax Collector to the State for that year. As a part of the deed there is the following recital:

"And whereas, said lands having been entered upon the books of the State Land Commissioner and the State Land Commissioner of the State of Alabama, with the approval of the Governor has fixed the price of said land and ascertained that the sum of \$142.38 is sufficient to cover and satisfy all claims of the State and County against said land for or on account of taxes, interest, fees, and costs of officers which were due upon or accrued against said lands, as provided by law."

"The property is now in the possession of a grantee from Florence Morgan Shelton. As noted above, the taxes and the costs and expenses of sale for the years 1929, 1930, 1931 have not been paid.

"Will you please advise me whether the State now has a claim against this land for the taxes for the years 1929, 1930, and 1931? If in your opinion there is still a liability for these taxes, kindly advise me how to proceed to enforce the State's claim for these taxes."

From the foregoing statement, it appears that the sale by the State Land Commissioner to Florence Morgan Shelton on March 15, 1937 was made more than three years and less than five years after the property so sold had been bid in for the State at tax sale on November 20, 1933.

It may be reasonably inferred that in making the sale the State Land Commissioner was attempting to act under the authority vested in him by Section 279 of the Revenue Act of 1935 (Gen. Acts 1935, p. 373) reading as follows:

"Section 279. It shall be the duty of the State Land Commissioner to cause to be prepared a suitable book, in which shall be entered a description, as accurate as can be obtained, of all the lands which have

been bid in by the State, with the amount of State and county taxes due thereon, the date when such lands were bid in; and when three years shall have elapsed from the date of sale, such portions of lands as have not been redeemed shall be subject to sale by the State; and the State Land Commissioner with the approval of the governor, may sell the same at private sale to any purchaser, who may pay therefor in cash to the treasurer, such sum of money as the State Land Commissioner may ascertain to be sufficient to cover and satisfy all claims of the State and county, which sum shall not be less than the amount of money for which the lands were bid in by the State, with interest thereon at the rate of six per cent per annum from the date of sale, together with the amount of all taxes due on said lands since date of sale, with interest thereon at the rate of six per cent per annum from the maturity of such taxes. Provided, that if lands have not been redeemed or sold by the State five years from date of sale, such lands may be sold by the State Land Commissioner as hereinafter provided." (Emphasis supplied)

From the statement of facts, it further appears that at the time of sale and conveyance the property sold and conveyed by the Commissioner, with approval of the Governor, was subject to payment of taxes, interest, costs and fees, not only for the years 1932-1937 inclusive, but also for the prior years 1929-31 inclusive, and that in making the sale the Commissioner ignored or overlooked the latter claim of the State, and based the sale exclusively on the State's claim for taxes for the former years, to-wit, 1932-1937 inclusive.

It is plain enough therefore that the Commissioner made the sale and conveyance aforementioned without complying with the statute which was the only authority for a sale, and for a price not authorized by law, in that in fixing the price he disregarded the claim of the State for unpaid taxes for the years 1929-1931 inclusive, for which said taxes the property in question had likewise been bid in for the State on the same day whereon sale for 1932 taxes was made.

The above quoted section 279 of the Revenue Act of 1935 imposed upon the Commissioner the duty to keep a record of lands bid in by the State, showing (1) a description thereof, (2) the amount of taxes due thereon and (3) date of sale for taxes.

Upon the presumption declared by the courts that public officers, in the absence of proof to the contrary, have in their acts and conduct observed all requirements of law imposed upon them by the statutes under which they hold office, it is to be assumed that at the time of sale of the property in question to Florence Morgan Shelton in 1937, the Commissioner had a record of "all claims of the State and County" for unpaid taxes thereon, referred to in Section 279, supra.

I am of the opinion therefore that the claim of the State and County for the unpaid taxes for the years 1929-1931 inclusive was not released or destroyed by the commissioner's conveyance to Florence Morgan Shelton in 1937, for the good and sufficient reason that in making the same he did not comply with the law whereby, and whereby alone, he was authorized, as the agent or representative of the State, to sell and convey the property purported to be sold and conveyed.

The principles of law applicable to this situation are set forth and declared in **Union Central Life Insurance Co. v. State**, 226 Ala. 420, 147 So. 187.

In that case the question was whether by reason of the State Auditor's failure to take into account taxes on land bid in by the State at tax sale, subsequently accruing, the State, upon assignment of its certificate of purchase, forfeited its claim for such subsequently accruing taxes, or was estopped to enforce payment thereof as against the purchaser of the certificate and holder of the tax deed executed by the Judge of Probate to such purchaser.

Taking note of the failure of the auditor (then functioning under the Revenue Act of 1919 in the matter of sales of land bid in by the State at tax sale) to follow the mandate of the statute regulating such sales, the Court observed:

" *** Otherwise stated, a tax sale made by the State auditor, not in substantial compliance with the statute, viz., as here, for an amount less than that authorized by law, is void." Citing,

Crebs v. Fowler, 148 Ala. 366, 42 So. 553;

Copeland v. Bud, 155 Ala. 571, 46 So. 853;

Street v. Doyle, 187 Ala. 332, 65 So. 775;

Bolling v. Smith, 79 Ala. 535.

So in **Crebs v. Fowler**, supra, it was held that a sale by the State Auditor of lands previously bid in by the State was void, unless made in strict compliance with the statute authorizing such sales. In that case the Auditor made the sale before expiration of the time fixed by him in a notice to the former owner of the application to purchase, as required by the statute.

With reference to estoppel as against the State, it was observed on pages 423-4 of the opinion in **Union Central Life Insurance Co. v. State**, *Supra*:

"And it may be well to observe here that it is established that estoppel's against the State are not favored, and this rule is based upon public policy for the enforcement of a public right or to protect a public interest." (Citing numerous authorities).

It may be well to note also that any construction of said section 279 and related sections 280 and 282 of the Revenue Act of 1935 whereby it was contended that the State may lose its lien, judgment or claim for unpaid taxes upon land conveyed by its agent without strict compliance with all requirements of the statute authorizing sale and conveyance, would violate section 100 of the Constitution of Alabama of 1901, to-wit:

"Section 100. No obligation or liability of any person, association or corporation held or owned by this State, or by any county or other municipality thereof, shall ever be remitted, released or postponed, or

in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability, or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

And in **Union Bank & Trust Co. v. Phelps**, 228 Ala. 236, 153 So. 644, it was held that taxes accrued to the State are an obligation or liability of the taxpayer within said Section 100, and as such cannot be remitted, released or postponed or in any way diminished by the legislature, or extinguished except by payment.

Moreover, where a statute is susceptible of two constructions, one of which would render it unconstitutional or at least subject to grave doubt as to constitutionality, and the other not, the courts will adopt the latter construction.

Interstate Commerce Commission v. Oregon-Washington etc. Co., 288 U. S. 14;

Crowell v. Benson, 285 U. S. 22, 62;

Wilkinson v. Stiles, 200 Ala. 279;

Reynolds v. Collier, 204 Ala. 38;

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

The conclusion would seem to be inevitable therefore that the Land Commissioner's sale and conveyance in 1937 being void, likewise the deed executed thereupon, notwithstanding its recitals above quoted in the request for this opinion,—the right of the State to enforce its lien and claim for unpaid taxes against the lands thereby sought to be conveyed was not affected.

Title to said land, in my opinion, is still vested in the State under its sale for the years 1929-1931 inclusive.

In such circumstances the State's approximately remedy would seem to be to sue in ejectment for the possession of said lands.

In this connection attention is called to Section 251 of the Revenue Act of 1935 (General Acts, 1935, p. 363) as amended by Act No. 525, H. 834, approved September 14, 1935 (Acts 1935, p. 1112), which indicates the procedure to be taken in such cases, reading so far as pertinent as follows:

"Section 251. When the lands are bid in for the State at tax sales the State shall be entitled to possession of said lands immediately upon execution of the certificate of sale by the Judge of Probate. If possession be not surrendered within six months from the date of sale after demand therefor is made by the State Land Commission in behalf of

the State, or if the certificate has been assigned, by the assignee, then the State Land Commissioner in the name of the State or the assignee of the State, if the certificate has been assigned may maintain an action in ejectment or a statutory real action in the nature of ejectment, or other proper remedy for the recovery of the possession of the lands purchased at such sales, and shall be entitled to hold the possession thereof on recovery, subject, however, to all rights or redemption provided for in this act."

By Acts 1939, p. 3, the Commissioner of Revenue is ex-officio State Land Commissioner.

The foregoing opinion is based, of course, upon the premise that the sale for 1929-1931 taxes was a valid sale and vested title in the State, nothing to the contrary appearing.

Under date of August 17, 1940 and since the preparation of the foregoing opinion, there has been submitted a copy of an application dated February 24, 1937 to the State Land Commissioner by Florence Morgan Shelton to purchase real estate in Jefferson County described as Lot 12 Block 6, Walker Land Company's Addition to Birmingham, under Sections 279-283 of the Revenue Act of 1935. On the back of the application appears an affidavit alleging that the applicant "is the true and rightful owner of said property."

In my opinion, this recital vitiates the application to purchase. As owner, the applicant's rights were governed by Section 268 of the Revenue Act of 1935 (Gen. Acts, 1935, p. 368) and Section 269 of said act as last amended by Act No. 55 H. 24, approved March 26, 1936 (Gen. Acts, 1936, Extra Session, p. 30).

As redemptioner, pursuant to said statute, the applicant was required to apply to the probate judge for redemption of the property on a form furnished by the State Land Commissioner and to deposit with the probate judge the amount of money for which the property had been sold with interest at the then prevailing legal rate plus the amount of taxes due on said property since the date of sale with interest thereon from their respective maturities, together with officers' costs and fees. Whereupon the probate judge was required to submit the application to the tax assessor for entry thereon of assessment values for years subsequent to the sale and review thereof if necessary by the county governing body.

Thus it will be seen that the procedure appropriate for redemption is entirely distinct from and radically different from that prescribed for purchase by a disinterested purchaser of lands sold to the State, as prescribed by Sections 279-283 of the Revenue Act, supra.

The procedure for redemption after the deposit aforementioned of the redemption money with the judge of probate is provided by Section 274 of the Revenue Act of 1935 (Gen. Acts 1935, p. 371). It will be seen that said officer is required to issue a certificate of redemption showing a description of the land redeemed, date of redemption, amount paid, name of redemptioner, etc.; whereupon the State Land Commissioner, upon delivery to him of the certificate of redemption issued by the judge of probate, gives the redemp-

tioner another certificate releasing all claims of the State as against the land redeemed.

In conclusion, I am of opinion therefore that whether the transaction in question be regarded as a conveyance or as a redemption, in either event, the State still retains its claim for unpaid taxes accruing and unpaid prior to the sales for taxes in 1933.

The whole proceeding seems to have been a badly confused procedure which was ineffective either to divest the State's title or to operate as a redemption by the owner.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 29, 1940.

Hon. W. C. Farmer,
Deputy Solicitor,
Houston County,
Dothan, Alabama.

Deputy Solicitors — Telephones —

Board of County Commissioners or other governing body of county may not reimburse deputy solicitor for amount paid by him for telephone, where his office is located outside of courthouse.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of August 10, 1940 follows:

"Please give me your opinion on the following question:—

"Would the Board of County Commissioners of Houston County, Alabama, be authorized to reimburse me the amount paid by me for telephone in my office?

"My telephone is used principally in connection with my duties as County Solicitor.

"My office is not located in the Court House as there is no available space now nor has there been since my appointment as County Solicitor."

Upon investigation, I find that you are not a county solicitor, as you style yourself in the above request, but are a deputy solicitor, appointed by the Circuit Solicitor under the provisions of Section 5522 of the Code of 1923.

My answer to your inquiry is in the negative.

This office in an opinion rendered to Hon. W. C. Batson, Judge of Probate, Chambers County, under date of May 25, 1931, Biennial Report, Attorney General, 1930-32, page 296, held that there was no authority for a county to furnish a deputy or county solicitor with an office or a telephone. This opinion was reaffirmed in an opinion rendered to Hon. R. H. Williams, Judge of Probate, Marshall County, under date of November 21, 1939, Quarterly Report Vol. XVII, page 289, wherein this office ruled that there was no authority for a county to pay office rent for a deputy or county solicitor. In my opinion, it necessarily follows that if a county cannot pay office rent for a deputy or county solicitor, it would not be authorized to pay for a telephone where a county or deputy solicitor's office is located outside of the courthouse. The opinion appearing in Quarterly Report, Vol. XV, page 30, wherein it was ruled that a county could legally pay for telephone service for a county or deputy solicitor where such solicitor maintained an office outside of the courthouse due to crowded conditions therein is hereby expressly overruled and withdrawn. Also opinion appearing in Quarterly Report of Attorney General Vol. XII, pages 62 and 130, in so far as they conflict with this opinion, are hereby overruled and withdrawn.

This office, in an opinion rendered to Hon. Joe M. Bonner, Deputy Solicitor, Camden, Alabama, under date of August 26, 1940, held that Act No. 648 S. 444, approved July 10, 1940, which act required the county to furnish office space for solicitors and the State to furnish telephone service, stamps, and other necessary equipment, has no application to deputy solicitors appointed under the provisions of Section 5522 of the Code of 1923.

You are therefore advised that in my opinion the Board of County Commissioners of Houston County may not legally reimburse you for the amount paid by you for telephone service in your office.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 29, 1940.

Hon. A. D. Sherrill,
Tax Collector,
Colbert County,
Tuscumbia, Alabama.

Taxation—Notices—

The printer advertising real estate for tax sales, which real estate is bought in for the state, is entitled to pay for printing the precinct and number thereof in such advertisement.

Opinion by Assitant Attorney General Haynes.

Dear Sir:

I have your letter of August 5, 1940, in which you request my official opinion as follows:

"Last year the State Comptroller refused to pay the printer for publishing the three words, 'Beat No. 2,' and this year he again questioned the payment of the same in the publication of the tax sale of Colbert County.

"In the acts of 1935, page 356, I find that the law requires that the precinct be published in all advertisements, and for the term of my office I have been doing that and the printer has received pay for same.

"This Section of the act says: 'In all advertisements for the sale of real estate the notice shall state the precinct in which the property is situated, etc.'

"It is my opinion that this is mandatory on the part of the collector and that the printer should be paid for the words used in describing the precinct, and in order to clarify the situation would appreciate a ruling from you as to the meaning of this section of the acts."

In answering your request I call your attention to Section 226 of Article 8, Chapter 1, Sale of Lands for Taxes, Act No. 194, H. 324, approved July 10, 1935, General Acts of 1935 p. 356. This section says in part as follows:

"In all advertisements for the sale of real estate the notice shall state the precinct in which the property is situated. * * *"

See *Craig v. Swader*, 225 Ala. 366, 143 So. 553.

I also call your attention to Section 233 of the Act of 1935, supra, which reads in part as follows:

"The cost of advertising the caption and conclusion of notices for the sale of real estate for the payment of taxes, and so much thereof as pertinent to those portions of such real estate as are bid off for the state, must be paid by the state."

I am of the opinion that the printer advertising such tax sales is entitled to pay for printing the precinct and number, as the law quoted above makes it imperative that the precinct and number be given in such advertisement. The precinct and number is in fact the caption of each subdivision which is offered for sale.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 30, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools and School Districts—Teachers—Statutes—

Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759), generally referred to as the "Teacher Tenure Act", discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

You have propounded several inquiries to this office involving a construction of Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759), generally referred to as the Teacher Tenure Act, and several other inquiries involving a construction of this act have been propounded by various other officials over the State. I deem it advisable to deal with and answer all of the inquiries propounded to me involving a construction of this act in one official opinion addressed to you, copies of which opinion will be mailed to the various other officials over the State who have propounded inquiries to me in regard to the same.

Stated as briefly as possible, the several inquiries are:

A. (1) Is said act constitutional?

(2) If it becomes necessary for the welfare of a school for the county superintendent of education to transfer a teacher to another school, and the local trustees of the school to which the teacher is transferred are not willing to accept the teacher, what action is left for the county superintendent of education to take?

B. On April 18, 1940, Mr. _____, Principal of the school at _____ in _____ County, received the following notice from Mr. _____, the County Superintendent of Education of said county:

"After due consideration of your apparent, attitude, spirit of co-operation and other factors pertinent, or relative to the employment of any teacher, it is my candid opinion that I should not recommend you to the _____ County Board of Education for re-employment as a teacher next year.

"Therefore, in compliance with Section 10 of Act No. 499, (of the Teacher Tenure Law), enacted by the last session of the Legislature of Alabama and approved September 21, 1939, it is now my duty and responsibility to notify you in writing of the termination of your employment with the _____ County Board of Education at the close of this scholastic year. Said termination being simultaneous with the expiration of your contract for the 1939-1940 scholastic year."

On April 29, 1940, the _____ County Board of Education met and officially ratified the action taken by the County Superintendent of Education. The County Board of Education did not cause any additional notice in writing to be given to Mr. _____ between April 29 and May 1.

(1) Since the notification to Mr. _____ was given by the County Superintendent of Education before securing the approval of the County Board of Education, does it constitute a legal notice as contemplated by Section 10 of the act?

(2) If the answer to the above question is in the negative, and Mr. _____ received no notice in writing between April 29 and May 1 of the action taken by the County Board of Education on April 29, 1940, is Mr. _____ legally employed for the ensuing year under the provisions of Section 10 of said act?

C. On April 24, 1940 the _____ County Board of Education notified a teacher in writing that he was re-employed for the ensuing year. On April 29 the trustees of the school in which the teacher was reemployed were given written notice of his assignment to their school. On May 6 the trustees unanimously refused such teacher and gave reason therefor in writing.

(1) Since the teacher did not receive written notice of refusal by the trustees from the _____ County Board of Education on or before May 1, under the provisions of Section 10 of said act, is said teacher re-employed for the ensuing year?

(2) Under the provisions of Section 180 of the Alabama School Code of 1927, the local trustees have the right to refuse a teacher within ten days of the notice of assignment. Do the local trustees have the right to refuse the reassignment of a teacher to their school, which teacher was employed in that school during the previous year, at any time during the full ten-day period specified in Section 180 of the Alabama School Code of 1927, if the ten-day period expires after May 1?

D. (1) If in a county the teachers are notified at the proper time by the county superintendent of education that they are reemployed in the county at the minimum salary, or at a salary not to exceed the minimum salary—particularly principals—is it necessary for the superintendent to recommend that the principal be reemployed at the same place?

(2) Under said act is it possible for the principal to continue in his present place where he has been for three successive years without the recommendation of the county superintendent of education?

E. (1) In the event of a dispute between a teacher and an employing board of education over the fact of whether or not said teacher received notice of termination of employment on or before the last day of the term of school in which the teacher was employed, and in no event later than the first day of May, as provided by Section 10 of said act, is the burden of proof upon the teacher to show that such notice was not received by said time, or is the burden of proof upon the employing board of education to show that such notice was received by the teacher within said time?

(2) Can you suggest some plan whereby the educational authorities may definitely determine that the teachers have received this notice?

These inquiries will be answered in the order in which they are set out hereinabove.

A. (1) The inquiry in regard to the constitutionality of said act is put in very general terms and no particular objections are urged against its constitutionality. I have carefully read the act in the light of the several constitutional provisions in regard to the enactment of legislation and the several constitutional provisions in regard to the public school system of this state and it does not appear that the act is in conflict with any of said provisions. If particular objections are urged against the constitutionality of said act, I shall be glad to consider them.

A. (2) If the teacher referred to was being reassigned to the school in which he was employed during the previous school year, it would be necessary to consider Section 10 of Act No. 499, supra, and its effect if any, on Section 180 of the Alabama School Code of 1927. However, from the statement that it was necessary for the welfare of the school for the county superintendent of education to transfer a teacher, I assume that the teacher was not already employed in the school to which he has been assigned for the succeeding school year, and, therefore, Section 180 of the Alabama School Code of 1927 governs, and it is not necessary to consider Section 10 of said act. Section 180 of the Alabama School Code of 1927 provides as follows:

"180. Teacher May Be Refused By Trustees.—The Board of School Trustees may by unanimous vote refuse to accept the assignment of any teacher within ten days from the date of the Superintendent's notice of assignment, upon written notification to the County Superintendent of Education setting out the reason for such refusal, and it is hereby made the duty of the County Superintendent of Education to nominate another teacher for such school."

Under said section, it is the prerogative of the local school trustees of the school to which the teacher is assigned for the succeeding school year, within ten days from the date of the notice from the county superintendent of education of such assignment, by unanimous vote, to refuse to accept the assignment of the teacher to their school, upon written notification to the county superintendent of education, setting out the reason for such refusal, as provided by Section 180 supra. If the local school trustees reject the assignment of a teacher to their school for the succeeding school year, which teacher is not already employed in their school, in compliance with the provisions of Section 180, supra, said section makes it the duty of the county superintendent of education to nominate another teacher for such school.

Should the local school trustees refuse to accept any teacher assigned to their school, thereby creating a controversy or dispute between the county superintendent of education and the county board of education, on the one hand, and the local school trustees on the other, the matter would have to be decided by the State Superintendent of Education, whose decision thereon would be binding. This is in accordance with the pertinent part of Section 68 and Section 71 of the Alabama School Code of 1927, which read in pertinent part as follows:

"68. Duties of State Superintendent.—The State Superintendent of Education shall explain the true intent and meaning of the school laws, and of the rules and regulations of the State Board of Education. He shall decide, without expense to the parties concerned, all controversies and disputes involving the proper administration of the public school system. * * *

"71. County and City Boards of Education's Action Reviewed.—The State Superintendent of Education under rules and regulations promulgated by the State Board of Education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the State Superintendent of Education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the State Superintendent shall be binding."

See also opinion of the Attorney General to Hon. Geo. E. Pass, Chairman, Board of Education, Blount County, Oneonta, Alabama, under date of December 6, 1938, Quarterly Report of Attorney General, Vol. XIII, page 95.

If the teacher involved has been reemployed for the succeeding school year by virtue of the provisions of Section 10 of Act No. 499, supra, then said teacher would occupy the same position during the succeeding school year that he occupied during the preceding school year, unless he was properly transferred to some other school in the county and was accepted by the local school trustees of the school to which he was so transferred, or unless said teacher is dismissed or his contract of employment is cancelled. If said teacher is in continuing service status, under the provisions of Act No. 499, supra, the contract of employment can be cancelled only on the grounds, and in the manner, provided by Sections 6 and 7 of Act No. 499, supra. However, if said teacher is not in continuing service status, he may be dismissed on the grounds and in the manner, provided by Section 117 of the Alabama School Code of 1927.

B. Section 10 of Act No. 499, supra, reads as follows:

"Section 10: Any teacher in the public schools, whether in continuing service status or not, shall be deemed reemployed for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; provided, however, that in no case shall such notice be given the teacher later than the first day of May of the termination of such employment, and such teacher shall be presumed to have accepted such employment unless he or she shall notify the employing board of education in writing to the contrary on or before the first day of June."

It is to be noted that the notice therein required to be given to a teacher by a certain date (on or before the last day of the term of the school in which the teacher is employed, but in no event later than May 1) must be given by the employing board of education and not by the superintendent of education, or rather that the employing board of education must cause said notice to be given. It is to be noted, further, that if the employing

board of education does not cause the notice therein provided for to be given to a teacher on or before the date therein specified, said teacher shall be deemed reemployed for the succeeding school year at the same salary.

While the county superintendent of education is the executive officer of the county board of education, Section 150 of the Alabama School Code of 1927, he is not the county board of education. As stated hereinabove, it is the employing board of education instantly, the county board of education, which shall cause the notice required by Section 10, *supra*, to be given to a teacher on or before the date therein specified, and while, undoubtedly, the county board of education could direct the county superintendent of education, as its executive officer, to give the notice for it, and a notice so given would comply with the requirement of said section that the employing board of education should cause the notice to be given; yet, in my opinion, the county superintendent of education cannot of his own volition give such notice in compliance with said section. It is further my opinion that any notice given to a teacher by a county superintendent of education without prior instructions from the county board of education to give the notice to that particular teacher would be of no force and effect whatever under said Section 10, *supra*.

The facts stated show that the county superintendent of education gave a notice to a teacher on or about April 18, 1940, to the effect that said teacher would not be reemployed for the ensuing school year, purporting to be acting in compliance with Section 10, *supra*; that at a meeting on April 29, 1940, the county board of education purported to ratify this action of the county superintendent of education but did not cause any additional notice to be given to the teacher on or before May 1. The facts given to me do not show whether the county superintendent of education in giving this notice to the teacher, acted entirely on his own volition, or pursuant to purported authorization of the county board of education attempting to delegate to him its power of determining what teachers would not be reemployed for the succeeding school year. However, as I see it, this is immaterial, for, in my opinion, the county board of education could not delegate this power to the county superintendent of education, and any attempt by it so to do would be null and void. Likewise, I do not think that the action of the county board of education on April 29, 1940, in attempting to ratify the action of the county superintendent of education in giving the notice to this teacher was of any legal force and effect.

The county board of education is a quasi corporation, a governmental agency, created by law, and endowed with certain rights and powers defined by statute, and, being the creature of statute, can exercise only those powers which are expressly conferred upon it, or necessarily incident thereto. **County Board of Education v. Slaughter**, 230 Ala. 229, 160 So. 758.

Under Section 10, *supra*, the power of determining what teachers shall be reemployed is vested in the employing board of education, and the statute does not give to said board the authority to delegate this power to the superintendent of education, and, in my judgment, it may not be so delegated. Cf. **Lanier v. Catahoula Parish School Board**, (La. App.) 154 So. 469, and **Andrews v. Claiborne Parish School Board**, (La. App.) 189 So. 355.

I quote from the latter case as follows:

"The power to employ and discharge teachers has been confided by the Legislature solely to the School Boards of the several parishes of the state * * *. The right to exercise this power may not be delegated."

This latter case is likewise authority for the position that the action of the county board of education in attempting to ratify the action of the county superintendent of education in notifying this teacher is of no force and effect. I quote from the opinion in that case, as pertinent, as follows:

"It would appear axiomatic that when the exercise of a power lodged in a political corporation by the creating authority is made so strictly personal as not to be delegable, the exercise thereof by any other person may not be made the subject of ratification or confirmation by such corporation. The converse, of course, is equally true. The test is: If a power is not delegable, its exercise by another may not be accorded legal vitality through ratification. ***

"Pertinent to the lack of power to ratify acts not legally delegable, American Jurisprudence, Vol. 2, Section 218, page 174, lays down the rule thus, 'Acts which cannot be legally delegated to an agent to perform, such as acts to be done in violation of law, or which would contravene public policy and which would amount to crimes against the state, cannot be ratified.'

"This statement of the principle finds support in 2 Corpus Juris Secundum, Agency, Section 36, page 1072; 7 R.C.L., Section 664, p. 663; 21 R.C.L., Section 104, p. 925; Restatement of the Law Agency, Section 84, p. 199.

"The principle is tersely given in *Anderson v. Pike*, Tutrix, 29 La. Ann. 120, as follows: 'No act reprobated by law, can be made valid by anybody's ratification.'

The premises considered, I answer the specific inquiries as follows:

1. Since the notification to the teacher was given by the county superintendent of education before he had been directed or instructed by the county board of education to give the notice to that particular teacher, it does not constitute a legal notice as contemplated by Section 10, *supra*; nor does the subsequent attempt of the county board of education to ratify the action of the county superintendent of education in giving the notice to the teacher make it a legal notice as contemplated by said section.

2. Since the county board of education did not cause notice in writing to be given to the teacher on or before May 1 that he would not be reemployed for the succeeding school year, in compliance with the provisions of Section 10, *supra*, he is legally reemployed for the succeeding school year at the same salary, under the provisions of said section.

The conclusion hereinabove reached in regard to the status of this teacher is in accordance with the ruling of the Circuit Court of Marshall County, Alabama, in Equity, in the case of *Grady Baugh, et als. v. Board of Education of Marshall County, Alabama*, on July 18, 1940, which ruling has been, or will be, appealed to the Supreme Court of Alabama.

C. These inquiries necessitate a determination as to what effect, if any, Section 10, *supra*, has on Section 180 of the Alabama School Code of 1927, *supra*. As pointed out hereinabove, a teacher is automatically reemployed for

the succeeding school year at the same salary under the provisions of Section 10, supra, unless the employing board of education causes notice in writing to be given to said teacher by the date therein specified. It has also been pointed out hereinabove that a teacher who has been reemployed for the succeeding school year under the provisions of Section 10, supra, retains the position which he held during the preceding school year, unless he is transferred to some other school in the manner provided by law, or is dismissed, or his contract of employment is cancelled in the manner provided by law. This necessarily has the effect of depriving local school trustees of their prerogative under Section 180 of the Alabama School Code of 1927, supra, to refuse to accept a teacher assigned to that school if the teacher was assigned to that school during the preceding school year. In other words, in my opinion, Section 10, supra, is a pro tanto amendment of Section 180 of the Alabama School Code of 1927 and has the effect of making said section inapplicable to a teacher who is already employed in the school to which he is assigned for the succeeding school year. This conclusion is in accordance with the conclusion reached by the Legislature of Alabama in the new Code which will be published shortly. I am authoritatively advised that Section 180 of the Alabama School Code of 1927, supra, has been rewritten in the new Code, in view of Section 10, supra, to make it inapplicable to a teacher already employed in the school to which he is assigned for the succeeding school year.

The premises considered, the specific inquiries are answered as follows:

1. Since Section 180 of the Alabama School Code of 1927 is inapplicable to a teacher who is already employed in the school to which he is assigned for the succeeding school year, the teacher is reemployed for the succeeding school year under the provisions of Section 10, supra, notwithstanding the action of the local school trustees in refusing to accept the assignment of said teacher to their school.

2. In view of the above, the necessity of an answer to this specific inquiry is obviated.

D. (1) As pointed out hereinabove, under the provisions of Section 10, supra, a teacher is automatically reemployed at the same salary for the succeeding school year unless the employing board of education causes notice in writing to be given to said teacher that he will not be reemployed on or before the date therein specified, and it is not necessary that a teacher be notified by the county superintendent of education that he is reemployed. Consequently, in my opinion, a teacher who has been notified by the county superintendent of education that he is reemployed in the county at the minimum salary or at a salary not to exceed the minimum, and who has received no other notice, is reemployed at the same salary for the succeeding school year under the provisions of Section 10, supra.

If the employing board of education desires to change the salary of a teacher who is in continuing service status, it should cause notice to be given to said teacher, under the provisions of Section 10, supra, and by the date therein specified, that the teacher's salary will be changed, but in changing the salary of a teacher in continuing service status the provisions of Section 4 of Act 499, supra, must be complied with. If the employing board of education desires to reemploy a teacher who is not in continuing service status, but at a different salary, it should cause notice to be given to said teacher in compliance with the provisions of Section 10, supra, and by the date therein

specified that he will not be reemployed at the same salary, and should then proceed to negotiate a new contract of employment with said teacher; but the salary in the new contract of employment should be fixed in compliance with the provisions of Act No. 295, H. 852, approved September 2, 1935 (General Acts, 1935, page 714).

I have pointed out hereinabove that a teacher who has been reemployed under the provisions of Section 10, supra, retains the same position which he held during the preceding school year unless he is transferred to another position in the manner provided by law. However, a teacher so reemployed, whether in continuing service status or not, may be transferred to another position. If he is not continuing service status, the county superintendent of education, without any action on the part of the county board of education, may transfer him to another position, but subject to the right of the local school trustees to reject the assignment of the teacher to their school, if he was not already employed in their school, under the provisions of Section 180, supra. Section 161 of the Alabama School Code of 1927. As to a teacher in continuing service status, the transfer is made, not by the county superintendent of education, but rather by the county board of education, upon the recommendation of the county superintendent of education, and still subject to the right of the local school trustees to reject the assignment of the teacher to their school, if he was not already employed in their school, under the provisions of Section 180, supra. Section 5 of Act No. 499, supra.

So, it can be seen that the recommendation of the county superintendent of education is not necessary in order for a teacher who has been reemployed for the succeeding school year under the provisions of Section 10, supra, to retain the same position which he held during the preceding school year.

(2) The answer to the preceding inquiry obviates the necessity of an answer to this inquiry. However, it might be well to point out that a person who has served under contract as a teacher in the same county or city school system for three consecutive years and is reemployed, is thereafter in continuing service status, under the provisions of Act No. 499, supra. Section 2 of said act reads as follows:

"Section 2: Any teacher in the public schools, who shall meet the following requirements, shall attain continuing service status: (a) Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive years and shall thereafter be reemployed in such county or city school system. (b) Such continuing service status can be conferred only by the re-employment of such teacher for the school year beginning in the fall of 1940, or for some subsequent school year."

Consequently, a person who has been employed in the same place for three successive years and is reemployed under the provisions of Section 10, supra for the succeeding school year, is in continuing service status, and can only be transferred to another position or school in the manner provided by Section 5 of said act, supra.

E. (1) Since Section 10, supra, provides that a teacher shall be deemed reemployed for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher that he will not be so reemployed on or before the date therein

specified, it is my opinion that the burden of proof is on the employing board of education to prove that the teacher received the notice therein required to be given, and by the date therein specified. Causing said notice to be given is an action of the employing board of education, and it is incumbent upon said board to show that such action was taken.

(2) So that no dispute might arise over the question of whether or not the notice required to be given by Section 10, supra, was received by the teacher on or before the date therein specified, it would be advisable for the employing board of education either to cause the notice to be delivered to the teacher in person, taking the teacher's dated and signed receipt thereof, or to cause the notice to be mailed to the teacher by registered mail, return receipt requested, for delivery to the addressee only.

Act No. 499, supra, is an innovation in the public school system of this state, the wisdom of which is a matter addressed exclusively to the legislature. There are no decisions of our Appellate Courts construing the same. Some of the inquiries involving a construction of said act which have been propounded to me are exceedingly difficult, and it must be admitted that the answers which have been given to the same by me are, in some instances, far from being free from doubt. However, they represent my studied judgment. In arriving at these answers, I have been ever mindful of the fundamental and basic purpose of the act, which is to provide a system of security of employment for the teachers in the public school system of this state, and, in accordance with the well-known canon of statutory construction, I have construed the act in the light of this purpose.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 30, 1940.

Hon. Jas. C. Brown, Register,
Circuit Court, Tuscaloosa County,
Tuscaloosa, Alabama.

Costs in Divorce Proceedings—

Where a bill is filed in chancery for divorce, the costs of the litigation are items which must be paid before the decree for attorney's fee or other allowances come in.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 23, 1940, in which you request my official opinion as follows:

"In re: Collecting Attorneys fee along with costs, on execution.

"When a Judge of the Equity Court fixes a fee for the Solicitor in a divorce case, representing the complainant and orders same taxed up as other costs in the case, has the Register the legal right to include said attorney's fee in the Execution he issues for the collection of said costs?"

"In other words, has the Sheriff the right to collect attorney's fees when same has been ordered taxed as a part of the costs in a case, through the execution from the Register? Our Sheriff has raised the question that he doubts he has a right to collect an attorney's fee, even when made a part of the costs, and that is the question we desire to have you rule on, for which we thank you in advance.

"If the Sheriff succeeds in collecting a sufficient amount to pay the costs but fails to collect a sufficient amount with which to pay the Solicitor's fee, will the Register be permitted to retain his part of the costs and ignore the Attorney's fee or must the amount so collected be **prorated** between said Solicitor's fees and the balance of the costs?"

I do not think attorney's fee can be taxed by the decree of the court as costs. An Attorney's fee in divorce suits is a part of the judgment for the complainant or the respondent filing answer as cross-complainant. In divorce and alimony causes, the right to attorney fee is an incident to alimony or separate maintenance. When the right to a decree fixing alimony or maintenance is exhausted, so is the right to attorney's fee. **Rochelle vs. Rochelle**, 179 So. 325; **McEvoy vs. McEvoy**, 214 Ala. 112, 106 So. 602; **Higgins vs. Higgins**, 222 Ala. 44, 130 So. 677. Therefore I do not think attorney's fee can be collected as costs.

It is true execution may issue for alimony and attorney's fee and, as incidental to the main judgment, may also include the costs, which must be itemized and set out in the execution. See Section 7796, Code of Alabama, 1923, which is as follows:

"7796. Bill of costs to accompany the execution.—At the foot, or on some part of the execution, the clerk or register must state, in intelligible words and figures, the several items composing the bill of costs; and without such copy of the bill of costs, the clerk or register issuing the execution forfeits all right to receive any costs in that case."

In this connection we call attention to the following language found in the opinion of the Supreme Court in the case of **Ex Parte Watson**, 220 Ala. 409, 125 So. 669.

"* * * As our statute, however, makes no allowance for attorney's fees, it is a matter governed by general principles, and influenced by the good faith of the proceedings and probability of success. **Ex Parte Boyette**, 211 Ala. 129, 99 So. 853; **Bell v. Bell**, *Supra*."

Quite different as to costs, the statutes do make allowances for costs in stated and specific items. Cost is money earned by the officers of the court and witnesses. It is true the successful party recovers judgment for costs, but only as trustee.

Attorney's fee and alimony are allowances and are not a part of the costs of the case.

In an opinion of this office, rendered June 14, 1938, to Hon. Roy O. Hill, Clerk, Circuit Court of Houston County, Biennial Report of Attorney General 1936-38, p. 653, it was held (the opinion quoting from Mayfield's Digest, Vol. 7, p. 208):

"The officer's fees are a part of the plaintiff's costs which he is supposed to have paid to them, and which he collects ostensibly for himself, but actually for them, by his execution. Such has been the practice from the foundation of the State as a province. They are seldom, perhaps never, paid by the plaintiff in the first instance; but they are subsequently paid by the sheriff into their hands. Though the legal title to them is in the plaintiff, it is only as a trustee; and the officers may consequently sue out an execution for them in his name. 3 Barr, 425."

Therefore, a decree for costs and the decree for the relief as prayer for are two separate items of the decree or judgment. Therefore, I am of the opinion the first item to be paid is the cost of the litigation. Biennial Report of the Attorney General, 1936-38, supra. In the above opinion it was held:

"In the above case it was held that the legal title to the cost was in the plaintiff, but only as a trustee. Trustee for whom? For the officers to whom the cost must go. Therefore, we are of the opinion that when the plaintiff recovers his judgment together with the cost of the suit and the levy is made under execution or the judgment is collected by the clerk or sheriff without execution, the cost of the litigation is the first item to be paid out of the proceeds of the judgment. This has always been the custom in Alabama and I doubt not if this matter was to go before the Supreme Court this court would say that the custom so long in force in Alabama had become an unwritten law. This would be no vile presumption for certainly as far back as we are able to go, this principle has been recognized by the courts, by litigants and by officers."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 31, 1940.

Hon. I. C. Heck,
State Comptroller,
Department of Finance,
The Capitol.

Legislature—Secretary of Senate and Clerk of House entitled to compensation as fixed by the Governor, beginning six weeks after final adjournment of the Legislature. Said compensation is payable out of appropriations for expenses of the Legislature in the same

form and in the same manner as heretofore paid when the Legislature was in session.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 30, 1940, in which you request my official opinion as follows:

"The Secretary of the Senate has been assigned to the State Planning Department beginning as of August 14, 1940, and the Clerk of the House of Representatives has been assigned to the Attorney General's Department, beginning as of August 14, 1940.

"Please advise as to what fund or funds these expenses are to be paid from and the proper form or forms to be used in submitting the accounts for payment."

I am of the opinion that the Secretary of the Senate and the Clerk of the House are entitled to compensation as fixed by the Governor, beginning six weeks after final adjournment of the Legislature, same to be paid out of any appropriations for the expenses of the Legislature in the same form and in the same manner as heretofore paid when the Legislature was in session.

Section 7 of Act No. 17, S. 75, approved March 8, 1933, (General Acts, 1933, p. 9), as amended by Act No. 261, H. 743, approved August 21, 1935, (General Acts, 1935, p. 655) is as follows:

"Section 7. All subordinate officers and employees of the Senate and of the House of Representatives, whether elected or appointed, shall hold office at the pleasure of their respective Houses and may be removed for cause at any time, and their employment and compensation therefor shall not extend beyond the duration of the session at which they were elected or appointed, except the Secretary of the Senate and the Clerk of the House of Representatives, whose terms of office or employment and compensation, as heretofore, herein or hereinafter fixed and provided for, shall not be affected by the provisions of this Section. For the purpose of checking, comparing, completing and filing the journals of their respective Houses in the office of the Secretary of State, and copying and delivering the journals to the State Printer, the Secretary of the Senate and the Clerk of the House shall be allowed the following clerical assistants, viz: The Secretary of the Senate is hereby allowed the Assistant Secretary, Second Assistant Secretary, the Chief Clerk and the Reading Clerk of the Senate, together with twelve (12) assistants to be named by the Secretary of the Senate; and the Clerk of the House shall be allowed the Assistant Clerk, Second Assistant Clerk, the Reading Clerk, the Chief Clerk to the Clerk of the House, together with twelve (12) assistants to be named by the Clerk of the House; and the Secretary of the Senate and the Clerk of the House shall be allowed six (6) weeks with said clerical assistants within which to check, compare, and deliver the journals of the Senate and the House of Representatives of each session of the Legislature to the Secretary of State and the State Printer. The time allowed after final adjournment of the Legislature for the filing

of the journals in the office of the Secretary of State and completing the work above mentioned is hereby fixed at six (6) weeks. In addition to the duties herein or otherwise imposed upon or required of the Secretary of the Senate and the Clerk of the House, they shall constitute an information bureau for the members of the Legislature and the general public insofar as it is possible for them to obtain the information required at the State Capitol, provided, however, that when their work of completing and filing the journals of their respective Houses has been completed after final adjournment, their compensation shall be fixed as provided by Section 9-A of the Budget Control Act of 1932, **provided further, however, that in the event of the repeal or the declaring void or unconstitutional of the Act or provisions above mentioned, the Governor shall assign duties to and fix compensation of the Secretary of the Senate and the Clerk of the House of Representatives and the respective clerical assistants herein provided for."**

Section 11 of Act No. 112, H. 72, approved March 7, 1939, (General Acts, 1939 p. 144) specifically repeals Section 9-A of the "Budget Control Act" of 1932, (General Acts, 1932, p. 35).

Section 9-A of the "Budget Control Act" having been repealed, then the Governor shall assign duties to and fix the compensation of the Secretary of the Senate and the Clerk of the House of Representatives. This he has done.

Section 1527, Code of Alabama, 1923, provides that the Secretary of the Senate and the Clerk of the House shall hold their offices until their successors are qualified. Section 7 of the Act approved March 8, 1933, as amended, after stating that the employment of all subordinate officers and employees of Senate and of the House shall not extend beyond the session for which they were elected or appointed, except the Secretary of the Senate and the Clerk of the House, whose "terms of office or employment and compensation, as heretofore, herein or hereafter fixed and provided for, shall not be affected by the provisions of this Section".

And further, said Section 7, after allowing the Secretary of the Senate and the Clerk of the House certain specified clerical assistants for a period of six weeks after final adjournment of the Legislature, adds the following:

"In addition to the duties herein or otherwise imposed upon or required of the Secretary of the Senate and the Clerk of the House, they shall constitute an information bureau for members of the Legislature and the general public insofar as it is possible for them to obtain the information required at the State Capitol."

The last quoted part of said Section 7 clearly and unmistakably shows that the Legislature intended that the Secretary of the Senate and the Clerk of the House should, during the time the Legislature was not in session, perform certain duties for the members of the Legislature. The services to be performed after final adjournment of the Legislature would pertain to legislative matters in which the members of the Legislature were interested and needed information which the Secretary of the Senate and the Clerk of the House could secure for them on account of their familiarity with legislative matters. It will be noted further that this provision for the duties and compensation of the Secretary of the Senate and the Clerk of the House is included in and a part of the Act which provides for the duties and compensation of all subordinate officers and employees of the Legislature while in

in session and for six weeks after final adjournment. Certainly the Legislature intended that all of its officers and employees should be paid out of the same fund. Could the Legislature have intended to pay one group of its officers and employees out of one fund and another group out of a different fund? I say decidedly "No". The Secretary of the Senate and the Clerk of the House of Representatives are subordinate officers of the Legislature and were elected by their respective Houses for a term of four years, and during that term they should be paid out of the appropriation for the expenses of the present Legislature in the same form and in the same manner (subject to the limitation of the compensation fixed by the Governor) as if the Legislature was actually in session.

Since I have reached the conclusion that the Secretary of the Senate and the Clerk of the House should be paid for their services out of any appropriation made to defray the expenses of the present Legislature, the question now arises—Do the appropriations for the expenses of the Legislature lapse as provided for in Section 11 of Act No. 144, S. 35, approved March 16, 1939, (General Acts, 1939, p. 100), amending Section 22 of the "Budget and Financial Control Act", supra? I am of the opinion that this question should be answered in the negative.

In discussing the proration of appropriations, the Supreme Court of Alabama in the case of *Abramson v. Hard, Comptroller, et al.*, 229 Ala. 2, 155 So. 590 said:

"While the words 'all appropriations' might include all appropriations made by the Legislature, it is manifest from the provisions of sections 19 and 30 of the Budget Act that they were not intended to have such a broad meaning, but that their meaning was restricted to appropriations required to be allotted by the Governor, and, therefore, that only such appropriations are required to be prorated. It is further manifest from such sections that the only appropriations required to be allotted are appropriations for the administration, operation, and maintenance of any department, institution, bureau, commission, or other state agency upon quarter requisitions for the amount estimated to be necessary to carry on its work during the succeeding quarter. All other appropriations are therefore available without any allotment, and so far as the provisions of the act are concerned, may be paid in full. * * *"

Appropriations for legislative expenses are not in that category of appropriations required to be allotted by the Governor, neither are they appropriations to any department, institution, bureau, board, commission, or other State agency. Therefore, in my judgment, the same do not come under the provisions of the Budget and Financial Control Act of 1932, supra, as amended, relative to proration. Reasoning by analogy it follows that said appropriations also do not come within that category of appropriations which lapse at the end of a fiscal year as provided in Section 22 of the Budget and Financial Control Act of 1932, as amended, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 3, 1940.

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Probate Judge—Liable for issuance of warrants on county depository without authority of law.—

Probate Judge liable on his official bond for warrants issued by him without authority of law upon which such warrants county funds are expended, notwithstanding county governing body had audited and allowed claims therefor.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 15, 1940, in which you request my official opinion as follows:

“Please clear up a proposition of law as regards the liability of the Probate Judge of Dallas County for items deemed illegal appropriations by the Dallas County Court of County Revenue. From time to time there have been small items which the Examiners have charged back and made claim on the bond of the **Probate Judge**.

“As a matter of fact this County has no Treasurer and under the special law four banks are designated as proper places for the deposit of money. The Board makes the designation. These banks are not required to make bond.

“Under Section 3 of Act found on page 15 of the Acts of 1931 (Local) with reference to Dallas County, are the following provisions as to the duties of the Probate Judge:

“Section 3. The Probate Judge shall issue and sign all checks and warrants required by law to be issued and signed. In the event of the absence of the Probate Judge from the City of Selma, or in the case of illness rendering him unable to attend to business, the Court may at a regular meeting designate one of their number to sign said checks or warrants during the absence or disability of the Probate Judge, said designation to be entered upon the minutes of the Court. No checks shall be issued unless sufficient funds have been provided with which to pay same when presented for payment. The Probate Judge shall have no duties in connection with said Court or its duties or the duties of the members thereof except he shall have the right to cast the deciding vote on any proposition pending before the Court where two members vote in favor of the affirmative and two vote in favor of the negative. Except in case of such tie the Probate Judge shall have no right to vote on matters before such Court. And provided also that all papers and docu-

ments required by law to be signed on behalf of the County and authorized by the Court of County Revenue, shall be signed by said Probate Judge as now provided by law.'

"Under the provisions of this Law it appears to me that the signing of checks, etc. is perfunctory and carries with it no liability whatsoever. You will also note that in case of sickness or disability of the Probate Judge any member of the Board may be designated to perform this same service. Whatever liability rests upon the Probate Judge for the execution of checks for claims passed and approved by the Board of Revenue, it appears to me is found in this statute. The Probate Judge is not the treasurer of the County nor could he properly be said to be custodian of the funds of the county so far as this relates to Dallas County'.

Under the provisions of Act No. 51, S. 12, approved February 20, 1931, (Local Acts of 1931, p. 15), your duties with respect to the Court of County Revenues of Dallas County are more than perfunctory. You have authority under Section 1 of said Act to call the Court into session at any time for the transaction of county business. The court has authority under Section 2 of said Act to require you to furnish financial statements showing the financial condition of the county, and to require you to prepare and furnish a tentative budget for the consideration and guidance of the court. Under Section 3 of said Act you, as Probate Judge, issue and sign all checks, cast the deciding vote on any proposition pending before the court where two members have voted in the affirmative on any question and two in the negative. You are to sign all papers and documents required by law to be signed on behalf of the county and authorized by the Court of County Revenues. You are required to make and execute a bond for the faithful performance of your duties under said act in connection with the Court of County Revenues, in an amount of not less than twenty-five thousand dollars.

This office has heretofore ruled that the Probate Judge is liable on his official bond for warrants issued by him without authority of law upon which such warrants county funds are expended, notwithstanding the county governing body had audited and allowed the claims therefor. Biennial Report of Attorney General, 1930-32, p. 149; Biennial Report of Attorney General, 1936-38, p. 647; Quarterly Report of Attorney General, Vol. XVIII., p. 94.

Section 321, Code of Alabama, 1923, provides in part as follows:

"Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depositaries without authority of law."

Said Section 321, supra, is part of Article 2 of Chapter 17 of the Code of 1923 (Sections 312-324) which article is applicable to counties of a population of not more than 56,000 population. (See Section 312, Code of 1923, as amended by Acts of 1932, p. 227). Dallas County has a population of 55,094 according to the 1930 census.

I adhere to the rulings heretofore made and am of the opinion that you would be liable on your official bond for the issuance of any warrants not authorized by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 3, 1940.

Hon. R. K. Greene,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Taxes—redemption—deed from Probate Judge—Revenue Act 1935,
Sections 241 and 242.

The probate judge is required to execute deed to purchaser at tax sale other than the State or to the assignee of the certificate after expiration of certificate of purchase and payment of proper fee.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of July 2, 1940, in which you request my official opinion as follows:

"There have been a number of tracts of property sold for taxes in Hale County which were later acquired by the Federal Government in the Sub-marginal Tract.

"We give you as an example the property of J. E. Clements; purchased by Archie Otts Nov. 7th, 1938. This property was acquired by the Government by the exercise of an option on Oct. 1939. Mr. Otts is insisting that a tax deed be given to this property when due.

"Shall the Probate Judge issue such a tax deed knowing that the property has been acquired by the Government?

"It is urgent that you give me an early opinion on this matter as some deeds will have to be made in September of this year."

I call your attention to Sections 241 and 242 of Act No. 194, House Bill 241, approved July 10, 1935, (General Acts 1935, p. 256), which provides:

"Section 241. After the expiration of three years from the date of the sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate, a deed to each lot or parcel of real estate so'd to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the State and County thereto, but it shall not convey the right, title or interest of any reversioner or remainderman therein."

"Section 242. Such deed shall be signed by the Judge of Probate in his official capacity, and by him acknowledged before some officer authorized to take acknowledgement of deeds, and it shall be in all the courts of the State, prima facie evidence of the regularity of all proceedings recited therein both prior and subsequent to the decree of sale in any controversy, proceeding, or suit involving or concerning the rights of the purchaser, his heirs or assigns to the real estate thereby conveyed."

It will be observed that the Probate Judge must execute and deliver to the purchaser or person to whom a certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed. Your duty as Judge of Probate under said sections are merely ministerial and you are required to perform your duties as prescribed under said sections. You are authorized to execute a deed only upon a surrender of the certificate of purchase. Quarterly Report of Attorney General, Vol. II, p. 107; Quarterly Report of Attorney General, Vol. VI., p. 31, Quarterly Report of Attorney General Vol. VI., p. 164.

The matter of the Federal Government rights under the circumstances set out in your request is one of a personal nature between the government and the party from whom the government purchased the property.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 3, 1940.

Hon. Chas. E. Bragg,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

GASOLINE TAX—

Gasoline Tax Funds may be used to match W.P.A. funds for the erection of a warehouse to be used for storage of road supplies, as a county garage, and as office space for W.P.A. officials.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 16, 1940, in which you request my official opinion as follows:

"We have undertaken to build a Warehouse for road supplies, county garage and office room to house the W.P.A. officials in this county with the W.P.A. As this building and all connections thereto is for the benefit of roads and bridges in this county, please advise me if the sponsor's contribution to this project can be paid from the gasoline fund.

"I would appreciate an early opinion as I have some bills pending now awaiting your opinion as to whether or not it might be paid out of the gasoline fund."

I am of the opinion that your inquiry should be answered in the affirmative.

This office has heretofore ruled that gasoline tax funds may be appropriated to match R.F.C. funds, provided that same are used exclusively in strict compliance with the statutory authority for the expenditure of gasoline tax funds, viz: for the construction, maintenance and repair of public roads and bridges in the county. Biennial Report of Attorney General, 1932-34, p. 285; Quarterly Report of Attorney General, Vol. 1 p. 93.

The gasoline tax funds may be used by the county to purchase a gravel pit. Biennial Report of Attorney General, 1932-34, p. 249. The gasoline tax funds may be used to purchase or lease road machinery, Quarterly Report of Attorney General, Vol. XIII, p. 65; and may be expended for the removal of power lines on rights-of-way. Quarterly Report of Attorney General, Vol. XIX, p. 254.

As the funds may be used to purchase or rent road machinery, it follows by analogy that they may be used to erect a warehouse to be used for the storage of said machinery and road supplies, and as a county garage.

Likewise, this office has ruled that the gasoline tax may be used to pay the expense of maintaining a W.P.A. office, if the same is for the exclusive benefit of the construction, maintenance and repair of roads and bridges within the county. Quarterly Report of Attorney General, Vol. XVII, p. 325. By analogy, said funds may be used to build a warehouse to house said W.P.A. officials, when such is for the exclusive benefit of the construction, maintenance and repair of roads and bridges within the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 3, 1940.

Hon. Wm. A. Conrad,
Clerk of the Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County Civil Service Act—

Deputy Clerk of the Circuit Court of Mobile County, appointed to serve as Clerk of the Criminal Division of the Circuit Court, is authorized under the law, to perform the official duties of the Clerk of such Court and comes within the Unclassified Service, as defined

by the Mobile County Civil Service Act (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, page 298).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 24, 1940, in which you request my opinion as follows:

"On the 15 day of September, 1939, the date of the approval of the countywide Civil Service System for Mobile County as found in the General and Local Laws of the Legislature of Alabama passed at the Session of 1939, Page 298 of the Local Laws, I, as Clerk of the Circuit Court of Mobile County, Alabama, had two Deputy Clerks—one clerk to serve as clerk of the Criminal Division of the Circuit Court of Mobile County, Alabama, and one clerk to serve on the Civil Division of the Circuit Court of Mobile County, Alabama—as provided by the Granade Act which was approved on the 8 day of November, 1932, and as found in the Local Acts of Alabama for the Extra Session of 1932, Page 108. Both of said Deputy Clerks have been duly appointed by me and each has an oath of office on file in the Probate Court of Mobile County, Alabama.

"I respectfully request Your Honor's opinion on the following question, to wit:

"Am I or not under said Civil Service Act above referred to entitled to a Chief Assistant in the Unclassified Service?"

Upon inquiry by this office, you have advised that the particular question you desire answered is whether or not the Deputy Clerk for the Criminal Division, appointed by you under the so-called Granade Act of 1932, Act No. 260, H. 649, approved November 8, 1932 (Local Acts, 1932, page 109), and designated by you as your Chief Assistant, will come within the Unclassified Service as defined in the Mobile County Civil Service Act (Act No. 470, H. 952, approved September 15, 1939, Local Acts 1939, page 298). You state that you have appointed no other Chief Assistant than the Deputy Clerk of the Criminal Division and that said Deputy has taken the oath required by law.

You are advised that, in my opinion, the Clerk of the Criminal Division, so appointed by you, is within the Unclassified Service, as defined in the Mobile County Civil Service Act, *supra*.

Section 2 of the Mobile County Civil Service Act provides, as pertinent, as follows:

"Section II. UNCLASSIFIED SERVICE: The following shall be in the Unclassified Service: (1) Officials elected by popular vote and, in case of death, resignation, or removal, their legal substitute; (2) Where by present law official duties of any officer mentioned in subdivision One of this section are or may be performed by a chief assistant appointed by him, such chief assistant; * * *."

The Clerk of the Circuit Court of Mobile County is a constitutional officer elected by popular vote. Constitution of Alabama, 1901, Section 165.

The question thus presented is whether, by present law, the official duties of the Clerk are or may be performed by a chief assistant appointed by him.

The answer to this question is found in Subsection (2) of Section 6723 of the Code of Alabama, 1923, which provides as follows:

"6723. Clerks of circuit court have authority—* * * (2) To appoint deputies, with full power to transact all business of such clerks, such deputies first taking an oath to support the Constitution and laws of this state and faithfully to discharge the duties of deputy clerks of the court for which they act." (Emphasis supplied)

It has been several times held by the Appellate Courts of this state that a deputy clerk of the court, by statute, may do any act his principal could do, if present. *Stewart v. Desha*, 11 Ala. 844; *Lucas v. Belcher*, 20 Ala. App. 507, 103 So. 909, Cert. Den. 212 Ala. 597, 103 So. 912; *Brandon v. State*, 233 Ala. 1, 173 So. 238; answers to certified question conformed to, 27 Ala. App. 321, 173 So. 240, reversed 233 Ala. 20, 173 So. 251, cert. den. 233 Ala. 600, 173 So. 253.

It appearing, therefore, that under the statute as construed by the Appellate Courts of this state, the official duties of the clerk are or may be performed by a deputy, and since, by Section 6 of the Granade Act of 1932, *supra*, the clerk of the circuit court may employ as assistant "one clerk to serve as clerk of the criminal division of the circuit court", which clerk you state has been named Deputy and Chief Assistant, it is my opinion that such Deputy Clerk is in the Unclassified Service.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 5, 1940.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Elections—Constitutional amendment—ballots—

1. All constitutional amendments to be voted on at one election may be placed on the same ballot.

2. Constitutional amendments are numbered by the Governor's proclamation. This is for the convenience of the public and is not required by law.

3. Election officials appointed to conduct general election also conduct election on proposed constitutional amendments held on same day.

4. Such officials are not separately appointed.

5. Such officials not entitled to double compensation.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of August 15, 1940, in which you request my opinion as follows:

"As I read and understand the recent enactments of the Legislature there will be eight constitutional amendments to be voted upon at the November, 1940, General Election, which for the purpose of identification I shall designate as follows:

H. 666—Cobb;

S. 488—McCall;

H. 693—Brown of Covington;

S. 470—Malone;

S. 474—Malone;

S. 185—Harris;

H. 849—Thomas;

H. 613—Delony;

"Under the terms of four of these amendments, to-wit: S. 474—Malone, S. 470—Malone, H. 693—Brown of Covington and H. 613—Delony, provision is made for the election officials, in that—'The officers to hold such election shall be the same officers who are appointed to hold the general election.'

"Under the terms of two of these amendments, to-wit: S. 185—Harris, Section 5 and H. 849—Thomas, Section 4, provision for the appointment of election officials reads as follows: 'The officials for such election shall be appointed and such election shall be held in all things in accordance with the laws governing general elections.'

"Under the terms of two of these amendments, to-wit: S. 488—McCall and H. 666—Cobb, no provision is made for the appointment of officials to conduct the election on the amendments.

"Will you please give me your opinion on the following questions:

"First: Can all of the amendments be printed on one ballot?

"Second: Will, or have the amendments been designated by numbers?

"Third: Can the officers who are appointed to conduct the General Election also conduct the election on the amendments?

"Fourth: Under S. 185-Harris and H. 849-Thomas, provision is made for appointment of officials to conduct these elections—in your opinion could the same officials be used to conduct these elections as are used to conduct the General Election?

"Fifth: In your opinion if the same officials were used to conduct the election on amendments S. 185-Harris and H. 849-Thomas, as are used to conduct the General Election, would they have to receive appointments for both elections, and would the notice have to be given in the newspaper of the appointment of the officials for both elections?

"Sixth: Would the election officials be entitled to pay for the holding of one election, or would they be entitled to pay for holding the General Election and the election on the amendments?"

Section 284 of the Constitution as amended by Constitutional amendment XXIV and Section 285 of the Constitution provide for the mode of amending the constitution by constitutional amendments. These sections are as follows:

"Section 284. Amendments may be proposed to this constitution by the legislature in the manner following: The proposed amendments shall be read in the house in which they originate on three several days, and, if upon the third reading three-fifths of all the members elected to that house shall vote in favor thereof, the proposed amendments shall be sent to the other house, in which they shall likewise be read on three several days, and if upon the third reading three-fifths of all the members elected to that house shall vote in favor of the proposed amendments, the legislature shall order an election by the qualified electors of the state upon such proposed amendments, to be held either at the general election next succeeding the session of the legislature at which the amendments are proposed or upon another day appointed by the legislature, not less than three months after the final adjournment of the session of the legislature at which the amendments were proposed. Notice of such election, together with the proposed amendments shall be given by proclamation of the governor, which shall be published in every county in such manner as the legislature shall direct, for at least four successive weeks next preceding the day appointed for such election. On the day so appointed an election shall be held for the vote of the qualified electors of the State upon the proposed amendments. If such election be held on the day of the general election, the officers of such general election shall open a poll for the vote of the qualified electors upon the proposed amendments; if it be held on a day other than that of the general election, officers for such election shall be appointed; and the election shall be held in all things in accordance with the law governing general

elections. In all elections upon such proposed amendments, the votes cast thereat shall be canvassed, tabulated and returns thereof be made to the Secretary of State, and counted, in the same manner as in elections for representatives in the legislature; and if it shall thereupon appear that a majority of the qualified electors who voted at such election upon the proposed amendments voted in favor of the same, such amendments shall be valid to all intent and purposes as parts of this Constitution. The results of such election shall be made known by proclamation of the Governor. Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

"Section 285. Upon the ballots used at all elections provided for in section 284 of this constitution, the substance or subject matter of each proposed amendment shall be so printed that the nature thereof shall be clearly indicated. Following each proposed amendment on the ballot shall be printed the word 'yes', and immediately under that shall be printed the word 'no'. The choice of elector shall be indicated by a cross mark made by him or under his direction opposite the word expressing his desire, and no amendment shall be adopted unless it receive the affirmative vote of a majority of all the qualified electors who vote at such election."

It is my opinion that your first inquiry must be answered in the affirmative. In my opinion Section 285 of the constitution as amended, *supra*, does not contemplate a separate ballot for each amendment as is shown by the following words used therein: "Following each proposed amendment on the ballot." Furthermore, in *Jones vs. McDade*, 200 Ala. 230, 75 So. 988, Mr. Justice McClellan, in passing upon a related but different point, recognized the practice of placing all proposed constitutional amendments on one ballot. He said:

"There were six amendments to the Constitution proposed by the houses in 1915, and these proposals were submitted on one ballot at the general election in 1916. It is manifest from a view of the whole official ballot and the proposal so submitted that no voter could have been misled or confused as between any of the six propositions subject to his ballot. This consideration compels the conclusion that the matter printed on the ballot under the heading 'Proposed Amendment No. 2' served to plainly distinguish the proposal now under judgment from the other five proposed amendments described on the official ballot."

In your second question you inquire as to whether the proposed amendments have or will be designated by number. These amendments will be designated by number by the Governor's proclamation which is provided for by Section 284 of the Constitution as amended, *supra*, as follows:

"Notice of such election, together with the proposed amendments, shall be given by proclamation of the governor, which shall be published in every county in such manner as the legislature shall direct, for at least four successive weeks next preceding the day appointed for such election."

Although there is no provision of law requiring that the proposed amendment be numbered it has been the custom of the Governor's office to number them for the convenience of the public.

It is my understanding that the Governor's proclamation has been issued in regard to the constitutional amendment proposed by Act No. 432, S. 488 (McCall) General Acts 1939, p. 582 which effects Mobile County, and that the Governor has designated it as Number 8. The Governor's proclamation has not, however, issued as to the other constitutional amendments.

In answer to your third and fourth questions, I call your attention to that part of Section 284 of the Constitution as amended, *supra*, which provides as follows:

"If such election be held on the day of the general election, the officers of such general election shall open a poll for the vote of the qualified electors upon the proposed amendments; if it be held on a day other than that of the general election, officers for such election shall be appointed."

It is therefore my opinion that regardless of the provisions of the acts proposing the constitutional amendments, the constitutional provision must prevail. *Jones vs. McDade*, 200 Ala. 230, 75 So. 988, H. Note No. 7, and the officials selected to conduct the general election must also conduct the constitutional amendments poll. *Opinion of Attorney General to Hon. W. W. Brandon, Judge of Probate, Tuscaloosa County, rendered October 7, 1920, Biennial Report Attorney General 1930-1932, p. 813.*

In answer to your fifth question, it is my opinion that the election officials would not have to receive appointments for both elections. Under the provisions of Section 284 of the Constitution as amended, *supra*, the officials appointed to conduct a general election shall conduct an election for the proposed constitutional amendments that are to be voted on that day. Therefore, it is my opinion that if the election is held on the day of the general election, no other officials may be appointed, and it is not contemplated that these same officials must be separately appointed to hold a constitutional amendment election. The provision providing for separate election officials in these Acts should be regarded as mere surplusage. *Opinion of the Attorney General to Hon. Pete B. Jarman, Jr., Secretary of State, rendered May 16, 1933. Opinions of the Attorney General, Vol. XIV, Office Edition, p. 148.*

In answer to your sixth question, it is my opinion that the election officials would only be entitled to compensation for the holding of one election. *Opinions of the Attorney General to Hon. Jno. P. Weaver, Board of Revenue, Calhoun County, Anniston, Alabama. Biennial Report of Attorney General, 1924-1926, p. 370, a copy of which is enclosed.*

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 7, 1940.

Dr. Walter B. Jones, Director,
Department of Conservation,
Montgomery, Alabama.

School Lands—Department of Conservation—

Director of Conservation authorized to lease Sixteenth Section lands to Alabama Polytechnic Institute, to be used as demonstration areas, at a rental of \$1.00 per year, provided that the improvements made thereon by Alabama Polytechnic Institute are equal to a fair rental value of said property, which improvements will enure to the benefit of said lands at the termination of the lease.

Opinion by Assistant Attorney General Screws:

Dear Sir:

I have your letter of August 27, 1940, in which you request my opinion as follows:

"Under the School Land Bill of 1939 (No. 581-H. 851-Dominick), the supervision and management of all State School lands was placed with the Department of Conservation. Under the Constitution of Alabama. Articles 257-260, inclusive, all revenues derived from 16th Section lands are placed in the State Treasury to the credit of a School Trust Fund which bears interest and the principal of which shall never be spent.

"Will you kindly render us your opinion as to whether or not it would be permissible for the Director of Conservation to lease to the Alabama Polytechnic Institute certain parcels of School land to be used as demonstration areas under the Jones-Bankhead Act at a nominal rent of say one dollar per year?

"Under Section 2 of the Dominick Act it states that the Director may do all things which in his opinion he deems advisable to be done for the best interest of the State concerning School lands. We believe that from the experiments which will be conducted on the lands that we propose to lease these and other School lands will be benefited by the application of measures and methods that the experiments may show are conducive to forest growth and betterment of the forest stands.

"Under Section 4 of the same Act it states that the Director may do such other things regarding School lands which in his opinion shall be for the best interest of said lands in the supervision and management of them. We feel that it would be to the best interest of the State to co-operate in this project, and an opinion from you in this matter will be very much appreciated."

I am of the opinion that your inquiry should be answered in the affirmative, provided the increased value of the property due to the improvements made thereon by the Alabama Polytechnic Institute would be equal to the fair rental value of said property, which improvements will enure to the

benefit of the land at the termination of the lease. In other words, the increased value of the property caused by the improvements made thereon, may be considered as rent; and, if same is sufficient to amount to a fair rental value, the consideration for the lease would be adequate rather than nominal.

Sixteenth Section land may be leased in accordance with the provisions of the statutes applicable thereto, subject, of course, to the terms of the original grants from the Federal Government and the limitations imposed by our Constitution. See *State v. Board of School Commissioners of Mobile County*, 183 Ala. 554, 63 So. 76.

Act No. 581, approved September 22, 1939 (General Acts, 1939, page 949) commits to the Director of the Department of Conservation and management of and supervision over Sixteenth Section lands, which supervision and control was formerly vested in the State Department of Education. Quarterly Report of Attorney General, Vol. XVIII, page 204.

Section 3 of Act No. 581, supra, provides as follows:

"Section 3. The Director of Conservation is hereby authorized to rent or lease school lands upon such terms as he deems advisable."

Said Section places a very broad discretionary power in the Director of Conservation. This is particularly true when it is read in connection with Sections 2 and 4 of said act. Section 2 provides for the practice of forestry on school lands and authorizes the Director to do all things which in his opinion he deems advisable to be done for the best interests of the State concerning school lands. Section 4, among other things, provides that the Director may do such other things regarding school lands which in his opinion shall be for the best interest of said lands in the supervision and management thereof.

However broad the powers granted to the Director of Conservation by the provisions of Act No. 581, supra, may be, the said powers are subject to the terms of the original grants from the Federal Government and to the limitations imposed by our Constitution. In this connection, I wish to specifically refer you to Sections 257 and 260, Constitution of Alabama, 1901, which provisions were adopted as part of our Constitution in conformity with the terms of the original grants from the Federal Government. In dealing with the powers granted to the Director of Conservation under the provisions of Act No. 581, supra, the opinion found in Quarterly Report of Attorney General, Vol. XVIII, page 204, supra, stated as follows:

"The act in effect constitutes the Director of Conservation trustee of these school lands, to be 'managed and supervised' by him in his capacity as trustee. It does not undertake to empower him to use the proceeds of same, or the income, of such lands otherwise than as provided by the Constitution or the terms of the original grants themselves, and is not, therefore, in any sense offensive to the Constitution."

Therefore, the limitations imposed by the terms of the original grant and the Constitutional sections above mentioned should be read in connection with the powers granted by Act No. 581, supra. In my opinion, the

above referred to sections of the Constitution do not contemplate that Sixteenth Section lands may be leased or sold for a nominal consideration. Section 257 provides as follows:

"The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this State or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific object of the original grants or appropriations."

It will be noted that the income arising shall be faithfully applied to the specific object of the original grants or appropriations; and such provisions, in my judgment, contemplates that in the case of a leasing of said lands, the consideration therefor should be sufficient and adequate rather than nominal.

Although you state that the contemplated lease would be for a nominal rent of \$1.00 per year, you also state that the work conducted by the Alabama Polytechnic institute on the lands would benefit the same. In my judgment, if the increase in the value of said lands, due to the improvements, which will enure to the benefit of the lands at the termination of the lease, would amount to a reasonable rental value of said lands, such increase in value may be considered as rent. In such an instance, the consideration would be adequate rather than nominal. If this be the situation, in my opinion you would be authorized to execute the lease under consideration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 7, 1940.

Hon. U. G. Watford, Sheriff,
Houston County,
Dothan, Alabama.

Sheriffs—Arrests—Commitments to Jail—

A sheriff may commit a person to jail, without process, at the request of a Highway Patrol Officer, as discussed below.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of July 23, 1940, in which you request my opinion as follows:

"I will appreciate it if you will kindly advise me what the law requires me, as Sheriff of Houston County, Alabama, to do under the following circumstances:

"(a) When a member of the State Highway Patrol arrests a party for the violation of a traffic law of the State and presents him to the County Jail for imprisonment, without a warrant or a commitment, due to the fact that no committing magistrate is presently available to sign the warrant and the commitment; and

"(b) Where a party has violated the traffic laws of the State in the presence of a member of the State Highway Patrol and he is arrested without warrant and presented to the County Jail for imprisonment but without a commitment, due to the fact that the arrest was made in the nighttime or during the week-end and no committing magistrate is available."

It is assumed from your inquiry that the person whom the Highway Patrol Officer presents to you for commitment in the county jail, arriving at such time as a magistrate is not available to issue a warrant for his arrest, has not been denied any right given to him by section 1397(106) of Michie's Alabama Code of 1928. This section provides:

"Section 1397(106). Appearance upon arrest for misdemeanor.—(a) Whenever any person is arrested for a violation of any provisions of this article punishable as a misdemeanor, the arresting officer, shall as otherwise provided in this section, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, and such person shall, if he so desire, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour and such hearing to be before a magistrate within the county or city wherein such offense was committed. Such officer shall thereupon and upon the giving by such person of a sufficient written bond, approved by the arresting officer, to appear at such time and place, forthwith release him from custody.

"Any person refusing to give such bond to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate.

"Any person who wilfully violates his written bond to appear, given in accordance with this section, shall be guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested.

"(b) The provisions of subsection (a) of this section shall not apply to any person arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person nor to any person charged with reckless driving in excess of fifteen miles per hour within a business district or residence district or in excess of forty-five miles per hour outside of a business or residence district nor to any person charged with driving while under the influence of intoxicating liquor or narcotic drugs nor to any person whom the arresting officer shall have good cause to believe has committed any felony, and the arresting officer

shall take such person forthwith before the nearest or most accessible magistrate.

"(c) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and shall be subject to removal from office."

Your questions (a) and (b) are so interrelated that an answer to the one will suffice as an answer to the other.

In my opinion, when a person is arrested by a State Highway Patrol officer for violation of a traffic law for which he may not be released by the officer upon his own recognizance, as is provided for by Section 1397(106), *supra*, and said officer presents him to you for commitment in the county jail pending the obtaining of a warrant from a magistrate for his arrest, you must be guided by the circumstances in each particular case.

The Supreme Court has spoken to the question in the cases of *Hayes v. Mitchell*, 69 Ala. 452; *Burge v. Forbes* (23 Ala. App. 67, 120 So. 577) cert. den., 219 Ala. 700, 121 So. 915; *King v. Robertson*, 227 Ala. 378, 150 So. 154. In the *Hayes* case, *supra*, the Court said:

"The time of the day or night, the surrounding circumstances, the peaceful or riotous conduct of the public, the necessity real or apparent that the arresting officer shall be on the alert to prevent other acts of violence or lawless disturbance, the accessibility of the mayor or other magistrate, all these enter into the inquiry, what is the duty of the arresting officer. If the mayor or magistrate be not accessible, or if the hour be unseasonable for entering upon the trial, or if the surrounding circumstances are such that the active duties of the marshal are really or apparently necessary for the preservation of the peace, or the protection of other persons or their property, then it is not the duty of the marshal to neglect these greater interests, that one lawless man may be brought to a speedy trial. Let it be borne in mind, we are dealing with a case, where the arrest is rendered lawful by the misconduct of the person arrested, and not with a case of causeless or wanton arrest. If the arrest in this case was without cause, of course no circumstances could justify the imprisonment.

"The ruling in this case was, that no circumstances would justify the marshal in imprisoning, without the order of the mayor thereof. In this the Circuit Court erred. The right to imprison was a question for the jury, under appropriate instructions. There should certainly be no imprisonment, unless the circumstances rendered such imprisonment necessary. If by reason of the unseasonableness of the hour, or the inaccessibility of the mayor or other magistrate having jurisdiction, the offender could not be then brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or, to protect others or their property from lawlessness, then it would not be the duty of the marshal to exhaust his entire energies, in personally detaining the prisoner, to the neglect of all other equally pressing duties. In such case, he would be authorized to imprison the offender, until he could be properly brought to trial.—*Johnson v. Mayor*, 46 Ga. 80; *Boaz v. Tate*, 43 Ind. 60; *Scircle v. Neeves*, 47 Ind. 289." (Emphasis supplied)

Cf. *Hill v. Wyrosdick*, 216 Ala. 235, 113 So. 49; *Ahlrichs v. Rollo*, 200 Ala. 271, 76 So. 37.

In 6 C. J. S. 618, Section 17(b), the rule is stated:

"It is ordinarily the duty of an officer after making an arrest, either with or without a warrant, to take the prisoner, within a reasonable time, before a justice of the peace, magistrate, or other proper judicial officer having jurisdiction, in order that he may be examined and held, or dealt with as the case requires. It is sometime said that this must be done immediately, or forthwith, or without delay. These requirements are construed to mean no more than that this duty must be performed with all the dispatch and promptness possible under the circumstances. Accordingly, an officer may detain a person arrested in custody for a reasonable time until he can conveniently and safely take him before a magistrate, if the circumstances are such as to preclude an immediate examination, hearing, or trial, as where the arrest was made at night or on Sunday; when the court was not in session, where the prisoner himself occasions the delay, as where he is drunk; or where the arresting officer is unable to find a judicial officer. Silmarly, a person arrested may waive his right to be taken before a magistrate, or consent to accompanying an officer without being taken before a magistrate. An officer may not detain a person arresting in custody longer than is reasonably necessary under the circumstances, or arbitrarily refuse to place a formal charge against a prisoner, thus preventing him from obtaining bail; nor may an officer detain the person arrested for any purpose other than to take him before a magistrate, and, accordingly, it has been held that a peace officer may not keep a person arrested in his custody for an unreasonable length of time in order to procure evidence from him, or to obtain his confession." (Emphasis supplied)

Applying these rules to the facts submitted by you, it is my opinion that if a State Highway Patrol officer requests you to commit to jail a person whom he has arrested and has in his custody for violation of traffic laws, that you should make diligent inquiry as to whether or not the offense for which the person is arrested is such that he is not entitled to release on his own recognizance under the provisions of Section 1397(103), supra, and that if you are satisfied that he is not entitled to be released upon his own recognizance thereunder, and if you are further satisfied that the arrest was made by the Highway Patrol officer upon probable cause, and that reasonable grounds exist for the belief that he is guilty thereof; and that by reason of the inaccessibility of a magistrate on account of the lateness of the hour, the offense being committed on Sunday or other reasonable cause, you properly may commit such person to the county jail for such a reasonable period of time as may be necessary in order to obtain a warrant from a magistrate for the arrest of the person for the offense for which he was arrested by the Highway Patrol officer.

Of course, after a warrant has been issued for his arrest and an order for his commitment to jail is signed by the magistrate, you are required to keep the said order or commitment on file and to preserve the same. Cf. Quarterly Report of Attorney General, Volume XVIII, page 222; Quarterly Report of Attorney General, Volume XIX, page 153; Code of Alabama, 1923, Section 4804.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 9, 1940.

Hon. W. Bentley Thomas,
Tax Assessor, Jackson County,
Scottsboro, Alabama.

Motor Vehicles—Taxation—

Motor vehicles in the State on October 1, 1939 or brought into the State on or before the last Monday in February, 1940, are subject to assessment and payment of ad valorem taxes when a license for the year 1940-41 is applied for.

Motor vehicles brought into the State subsequent to last Monday in February, 1940, are not subject to assessment and payment of ad valorem taxes when a license for the year 1940-41 is applied for.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated August 23, 1940 follows:

"Will you please at your earliest convenience give ruling clarifying Section "C" Schedule 158.12 Article XIII, Page 524 of General Acts of Alabama, Regular Session 1935.

"Ex—Mr. A. buys car out of State having alien tax on same, since March 1st assesses same with no tax due. After Oct. 1st 1940, assesses same car for fiscal year of 1940 claiming no tax for this year, (1940) because of its having been brought into state with alien tag since March 1st previous."

In answer to your inquiry, I first call attention to subdivision (c) of Schedule 158.12 of the 1935 Revenue Act. The pertinent part of said subdivision, for the purpose of this opinion, is as follows:

"(c) Motor vehicles brought into this State after the first day of October and before the Tax Assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the State on the first day of October."

Section 50 of the 1935 Revenue Act provides that the tax assessor shall have completed his assessment not later than the last Monday in February of each year. Said section is as follows:

"Section 50. When the assessor shall have completed his work of assessing, valuing and equalizing property, which has been listed for taxation in his county and such valuation shall have been entered on the assessments lists, which shall not be later than the last Monday in February of each year, he shall certify over his signature to the correctness of the returns, showing valuations fixed by him, and he shall at once notify

the State Tax Commission by registered mail, that he has completed his assessment, valuation and equalization work and that the tax returns are ready for the review and inspection as provided for in this Act. Such lists of property shall be by the assessor delivered to the Board of Review not later than the second Monday in March." (Emphasis supplied)

It will, therefore, be seen that a motor vehicle which was in the State on October 1, 1939 or was brought into the State before the tax assessor was required to have completed his assessment, which under the provisions of Section 50, supra, was not later than the last Monday in February 1940, is subject to assessment and the payment of ad valorem taxes when applying for a license for the year 1940-41. This applies to both new and used motor vehicles. See opinion of this office to Hon. H. L. Bishop, Tax Assessor, Etowah County, Gadsden, Alabama, Quarterly Reports, Attorney General Vol. I, page 261. As to the time licenses become due see Schedule 158.17 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212, H. 104, approved August 8, 1939, (General Acts, 1939, p. 363).

With further reference to the opinion to Hon. H. L. Bishop, supra, attention is called to the fact that the reasoning found therein is adopted and followed in this opinion. The fact that is was there held **that motor vehicles in the State on October 1, 1934 or brought into the State before the last Monday in March, 1935** were subject to assessment and payment of ad valorem taxes as of October 1, 1935, is not in conflict with the conclusion reached in the present opinion, inasmuch as the law now governing the time as to when the tax assessor must complete his assessment each year is governed by Section 50, supra, and not by Section 38 of Act No. 172, H. 294, approved August 22, 1923 (General Acts, 1923, p. 152) (Section 160, page 113, 1929 Compilation) as was then the case.

Applying the foregoing conclusion to the particular facts set forth in your inquiry, it will be seen that Mr. "A" will not be subject to assessment and payment of ad valorem taxes upon making application for license for the year 1940-41.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 10, 1940.

Hon. Hugh White, President,
Alabama Public Service Commission,
Capitol.

Foreign Corporations—Electric Cooperatives—Qualifications, Taxation—Supervision—Department of Finance—

1. Singing River Electric Power Association, a foreign electric power corporation, should qualify in Alabama as a foreign corporation before doing business in Alabama.

2. Singing River Electric Power Association, a foreign electric power corporation, doing business in Alabama is liable for state and county taxes in Alabama.

3. Singing River Electric Power Association, a foreign electric power corporation, doing business in Alabama is subject to regulation by the Alabama Public Service Commission and the Department of Finance.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated August 6, 1940, reads as follows:

"The Public Service Commission of Alabama, has been called upon by the Singing River Electric Power Association, of Lucedale, Mississippi, to advise such Association what is necessary under the laws of Alabama to enable the Association to extend the electric line and facilities of the Association across the Mississippi-Alabama state line in order to serve a customer located in Alabama, approximately two miles into Alabama from said state line.

"We are advised that the Singing River Electric Power Association is a cooperative corporation organized and existing under and by virtue of the laws of the State of Mississippi.

"We will thank you, therefore, to give us your official opinion as soon as you can upon the following questions, namely:

"1. Will it be necessary for this Association to qualify under the laws of Alabama as a foreign corporation in order to enable it to do business in Alabama?

"In passing upon this question we assume that the electric energy transmitted from a point in Mississippi to the location of the customer in Alabama.

"2. If the Association extends its line and facilities into Alabama to serve such customer, will the Association—

"(a) be subject to taxation by the State of Alabama or by any county or counties into which its line and facilities may be extended?

"(b) if subject to any taxation by the State or any county therein, what taxation would it be, ad valorem, or other form of taxation?

"(c) will the Association be subject to regulation by the Alabama Public Service Commission?

"Our information is that the customer proposed to be served by this Association is so situated that he is unable to obtain electric utility service from any existing private or public utility agency in Alabama.

"As the Association has indicated, it will be glad to render the service to the customer in question if it can do so under reasonable conditions, we will thank you for your opinion on these questions at your earliest convenience."

In my opinion, your first question should be answered in the affirmative.

Section 26 of Act No. 231, S. 155, approved August 16, 1939, (General Acts, 1939, page 371), the "Electric Cooperative Act," provides as follows:

"Section 26. Any corporation or association organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations and functions in this State **upon compliance with the general regulations applicable to foreign corporations desiring to do business in this State.**" (Italics ours)

In 20 C. J. (2) at page 49, Section 1830, it is said:

"So, also, a foreign corporation is doing business within the meaning of the statutes where the single act engaged in within the State is the very act which the corporation was organized to perform."

When the Singing River Electric Power Association extends its lines into Alabama and supplies current to residents of Alabama, in my opinion the Association is exercising its corporate powers in doing business in Alabama, and should qualify as a foreign corporation.

I refer you to the following Alabama authorities relative to what constitutes doing business in Alabama:

Simonetti Bros. Produce Co. v. Peter Fox Brewing Co., 197 So. 38 (Advance Sheet);

Franklin Life Ins. Co. v. Ward, 237 Ala. 474, 187 So. 462;

State v. Southern Natural Gas Corp., 233 Ala. 81, 170 So. 178;

Investors Syndicate Co. v. The State, 227 Ala. 216, 149 So. 83;

Friedlander Bros. v. Deal, 218 Ala. 245, 118 So. 508;

Houston Canning Co. v. Virginia Can Co., 211 Ala. 232, 100 So. 104;

Cable Piano Co. v. Estes, 206 Ala. 95, 89 So. 372;

Puffer Mfg. Co. v. Kelly, 198 Ala. 131, 73 So. 403;

Geo. W. Muller Mfg. Co. v. First National Bank of Dothan, 176 Ala. 229, 57 So. 762;

American Amusement Co. v. East Lake Chutes Co., 174 Ala. 526, 56 So. 961.

In answering your second question, I understand that the Mississippi Electric Membership Corporations are similar to the Alabama Electric Membership Corporations and are organized under nearly identical laws.

This office has held that Alabama Electric Membership Corporations are not instrumentalities of the State of Alabama or of the Federal Government and are not exempt from state taxation.

See: Quarterly Report of Attorney General, Vol. XI, page 116; Quarterly Report of Attorney General, Vol. VII, page 38; Quarterly Report of Attorney General, Vol. VI, page 76.

In further answering your question numbered 2,(a) it is my opinion that the foreign electric membership corporation will be liable for Alabama state and county taxation if its lines are extended into Alabama; (b) the foreign electric membership corporation will have to pay to the State of Alabama an annual permit fee, franchise tax based on the amount of capital employed in Alabama, income tax on its Alabama income, and state and county ad valorem taxes on its property in Alabama; (c) In my opinion, the Singing River Electric Power Association, a foreign electric power corporation, is subject to regulation by the Alabama Public Service Commission and the Department of Finance.

I have examined the original bill from which evolved Act No. 231, supra, which is on file in the Archives and History Department, the Registers and Journals of the two houses of the Legislature in regard thereto, which are on file in the Secretary of State's office and found that Sections 26, 28 and 30 of the bill, as introduced in the Senate, provided as follows:

"Section 26. Any corporation organized on a non-profit or a cooperative basis for the purpose of supplying electric energy and owning and operating electric transmission or distributing lines in a state adjacent to this state shall be permitted to extend its lines into and to transact business in this state without complying with any statute of this state pertaining to the qualification of foreign corporations for the transaction of business in this state. Any such foreign corporation as a prerequisite to the extension of its lines into and the transaction of business in this state, shall by an instrument executed and acknowledged in its behalf by its president or vice-president under its corporation seal attested by its secretary, designate the Secretary of state its agent to accept service of process in its behalf. In the event any process shall be served upon the Secretary of State, he shall forthwith forward the same by registered mail to such corporation at the address thereof specified in such instrument. Any such corporation may sue and be sued in the Courts of this state to the same extent that a cooperative may sue or be sued in such Courts. Any such foreign corporation may secure its notes, bonds, or other evidences of indebtedness by mortgage, pledge, deed of trust, or other encumbrance upon any or all of its then owned or after acquired real or personal property, assets, or franchises, located or to be located in this state, and also upon the revenues and income."

"Section 28. Cooperatives and foreign corporations transacting business in this State pursuant to this Act shall be deemed to be general welfare cooperatives and exempt in all respects from the jurisdiction and control of the Public Service Commission of this State.

"Section 30. The provisions of the Alabama Securities Act (Chapter 335, Article 12, and Chapter 220, Article 7, of the Code of Alabama, 1923 as amended by Act No. 481, Alabama General Laws, 1927, and by Act No. 656, Alabama General Laws, 1931) shall not apply to any note, bond, or other evidence of indebtedness issued by any cooperative or foreign corporation transacting business in this State pursuant to this Act to the United States of America or any agency or instrumentality thereof, or to any mortgage or deed of trust executed to secure the same. The provisions of said Securities Act shall not apply to the issuance of membership certificates by any co-operative or any such foreign corporation."

I wish to quote from Volume III of the 1939 Senate Journal, at page 1359, as follows:

"Amend Section 26 of S. B. 155 by striking out all of said section, as it appears in said bill and by substituting in lieu thereof the following:

"Section 26. Any corporation or association organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations and functions in this State upon compliance with the general regulations applicable to foreign corporations desiring to do business in this State."

"Amend S. B. 155 by striking out all of Sec. 27 of said bill."

"Amend Section 28 of S. B. 155 by striking therefrom the words 'and foreign corporations' on line 25 of page 25.

"Amend Section 30 of S. B. 155 by striking therefrom 'or foreign corporation' on lines 7 and 8 of page 26 thereof.

"Amend Section 30 by striking therefrom the words 'or any such foreign corporation' on line 12 of page 26 thereof."

The amendments quoted above appear in the bill as the same was passed and approved.

From the amendments, supra, it is clear that the Legislature made a distinction between Alabama cooperatives organized under this Act and foreign cooperative corporations desiring to do business in Alabama.

Section 28 of Act No. 231, supra, provides as follows:

"Section 28. Cooperatives transacting business in this State pursuant to this Act shall be deemed to be general welfare cooperatives and exempt in all respects from the jurisdiction and control of the Public Service Commission of this State."

In my opinion, a foreign cooperative corporation, doing business in Alabama, is not included within the exemption, supra.

As I know of no law exempting foreign cooperative corporations from regulation by the Alabama Public Service Commission, it is my opinion that

said corporations, when doing business in this state, are subject to regulation by the Alabama Public Service Commission.

Sections 9631 and 9795 of the Alabama Code of 1923 provide as follows:

"9631. Powers of public service commission.—The Alabama public service commission shall have and exercise exclusive jurisdiction, supervision and authority over the rates and charges, with full power to regulate, supervise and control said rates and charges, of all street railroad companies, telegraph companies, telephone companies, electric companies, gas companies, water companies, hydro-electric or water works companies, heating companies, combination gas and electric companies, combination electric and water companies, combination electric and heating companies, combination electric, heating and gas companies, combination electric, heating, gas and water companies, operating or doing business for hire in this state, either as a person, firm or corporation, but nothing herein shall be construed as a regulation of or interfering with interstate commerce. The provisions of this article shall not apply to municipally-owned utilities."

"Section 9795. Certificate of convenience and necessity.—No plant, property or facility for the production, transmission, delivery, or furnishing of gas, electricity, water or steam, and no street or interurban railway shall be construed except ordinary extensions of existing systems in the usual course of business, and no jitneys within the jurisdiction of the commission licensed, until written application is first made to the commission for the issuance of a certificate of convenience and necessity, and the issuance by the commission of such certificate. Upon the filing of any such application, and after a public hearing of all parties interested, the commission may, or may not in its discretion, issue such a certificate of convenience and necessity, and if issued, may prescribe such conditions upon the issuance as it may deem advisable."

Section 29 of Act No. 231, supra, provides as follows:

"Section 29. Cooperatives and foreign corporations transacting business in this State pursuant to this Act shall be deemed to be electric membership co-operatives within the meaning of the Public Works Board Act (Act No. 65, Alabama General Laws, 1935)."

Section 15 of Act No. 112, H. 72, approved March 7, 1939 (General Acts, 1939, page 144) provides as follows:

"Section 15. ABOLITION OF THE PUBLIC WORKS BOARD OF ALABAMA AND TRANSFER OF ITS FUNCTIONS AND DUTIES TO THE DEPARTMENT OF FINANCE. The Public Works Board of Alabama is hereby abolished and all of its functions and duties are hereby transferred to and conferred upon the Department of Finance. The power and authority of said Board with respect to the approval of any project or projects or the issuance of any bonds or securities shall be exercised by the Director of Finance or by the Chief of the Division of Local Finance, hereinafter provided for. The written approval of the Director of Finance or of the Chief of the Division of Local Finance, without any seal

or attestation, shall be sufficient approval for any project, bonds or securities requiring the approval of the Public Works Board of Alabama. None of the functions and duties of the Public Works Board of Alabama existing before the enactment of this Act shall be conferred upon or exercised by the Public Service Commission of Alabama."

On the basis of the two statutory provisions last above quoted, it is my opinion that the foreign cooperative corporations are also subject to regulation by the Department of Finance.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 10, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

1. Criminal law—Attempt—Attempt to commit statutory misdemeanor, not malum in se, is a misdemeanor.

2. Intoxicating liquors—Attempt to illegally possess prohibited liquor is a misdemeanor.

3. Indictment and information—Affidavit—Section 3307 of the 1923 Code of Alabama limited to trial on indictment and inapplicable to prosecutions based on affidavit or complaint.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of August 10, 1940, in which you request my opinion as follows:

"A prosecution is commenced in the Law & Equity Court by an affidavit being made charging a defendant with illegal possession of prohibited liquor. On the trial the defendant plead guilty to an attempt to commit the offense charged in the affidavit and the court fixes his fine at \$25.00. No special count in the affidavit charges the defendant with an attempt to commit the offense charged. Should the Solicitor's Fee collected be \$10.00 or \$30.00.

"If there is a count in the affidavit charging the defendant with an attempt to have illegal possession of prohibited liquor, should the so-

licitor's fee be \$10.00 or \$30.00, if the defendant pleads guilty to an attempt to have illegal possession of prohibited liquor?"

Section 3307 of the 1923 Code of Alabama provides as follows:

"Section 3307. Jury may find the attempt.—Upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense, charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt."

It is apparent from the above quoted section that upon trial under an indictment for an offense, the jury may find the accused guilty of an attempt to commit such offense without any special count in the indictment for such attempt. In the recent case of *Campbell v. State*, 191 So. 810 decided by the Court of Appeals on June 13, 1939, Cert. granted on other grounds in 238 Ala. 439, 191 So. 812, it was decided that section 3307, supra, is limited to trial on indictment and is inapplicable to prosecutions based on affidavit or complaint. The Court of Appeals in its opinion in this case said:

"This court, or any other court is without authority to extend the provisions of the foregoing statute (Section 3307). The statute says what it means and means what is says. It limits this operation to trial upon indictment, and there is no provision for its application to prosecutions based, as here, upon an affidavit or complaint."

I am cognizant of the case of *Bonner v. State*, 28 Ala. App. 406, 187 So. 643, Cert. den. 237 Ala. 446, 187 So. 645, wherein the Court of Appeals and Supreme Court reached a contrary conclusion. However, *Campbell v. State*, supra, is the last expression of the Courts upon this question.

In your first inquiry, you state that the prosecution was commenced by an affidavit charging defendant with illegal possession of prohibited liquor. It is my opinion, based upon the foregoing authority, that the defendant could not under such an affidavit, plead guilty to an attempt to commit the offense, and, therefore, a judgment of guilt of such attempt would be void. This, of course, pretermits the question of the solicitor's fee in this instance.

In answer to your second inquiry, it is my opinion that the solicitor's fee should be \$10.00.

As a general rule, an attempt to commit a crime is a misdemeanor, whether the crime attempted is a felony or misdemeanor, and whether an offense at common law or under the statute. 16 C. J., Section 90 page 111, and cases cited in Note 91. Corpus Juris states, as an exception to the general rule, that several courts have held that an attempt to commit a statutory misdemeanor, not malum in se, is not an offense unless expressly made so by statute. Our Court of Appeals in the case of *Corkran v. State*, 17 Ala. App. 112, 82 So. 560, followed this exception and held that an attempt to manufacture prohibited liquor, which was at the time of the original trial in that case a misdemeanor, was not an offense. However, our Supreme Court granted a writ of certiorari and reversed the Court of Appeals' decision in 203 Ala. 513, 84 So. 743, thereby holding that an attempt to commit a statutory misdemeanor, not malum in se, was a misdemeanor in Alabama.

Illegal possession of prohibited liquor is a statutory misdemeanor, not malum in se, in this State.—Sections 4621 and 4622, 1923 Code of Alabama. Therefore, it is my opinion that an attempt to illegally possess prohibited liquor is a misdemeanor, and such misdemeanor not being otherwise provided for in the schedule of Solicitors' Fees, (Section 3738, 1923 Code of Alabama) a Solicitors' fee of ten dollars (\$10.00) should be taxed upon conviction for same. Opinion of the Attorney General to the Hon. Ernest L. McClure, Clerk of the Circuit Court, Lauderdale County, rendered May 18, 1937, Quarterly Report of the Attorney General, Vol. 7, page 153; also opinion of the Attorney General to Hon. J. C. Pattillo, Clerk of the Circuit Court, Chilton County, rendered January 5, 1940, Quarterly Report of the Attorney General, Vol. 18, page 8.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 10, 1940.

Hon. R. A. Polglaze, Secretary,
Board of Registration for Professional
Engineers and Land Surveyors,
1118 Webb Crawford Building,
Birmingham, Alabama.

Engineers Registration Law (Act No. 271, S. 182, approved September 2, 1935, General Acts, 1935, page 661)—

A person not qualified under said Act may not engage in the practice of land surveying.

County Surveyor must qualify under the provisions of said Act before practicing the profession of land surveyor.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 20, 1940, in which you request my official opinion as follows:

"Section 10345, Code of Alabama of 1923, providing for the appointment of County Surveyors, reads as follows:

"The court of county commissioners is authorized to appoint two surveyors for the county, who hold office for the term of three years, and until their successors may be qualified, unless sooner removed. Before making an appointment, the court must be satisfied by evidence that the person appointed is qualified to discharge the duties of a surveyor. It is

no objection that a person appointed county surveyor is a qualified surveyor of an adjacent county; but he must qualify in each county.'

"Section 10348, which fixes the duties of County Surveyors, reads as follows:

"It is the duty of the surveyor faithfully to execute and return all orders of survey directed to him from any court of record in the state, and make all surveys of lands or lots in the county, at the request of any person interested therein, on payment or tender of his probably fees for the same.' (Emphasis supplied)

"Act No. 271, Regular Session 1935, provides for the registration of both Engineers and Land Surveyors. Section 1, of this Act, reads as follows:

"That in order to safeguard life, health and property, any person practicing or offering to practice the professions of engineering or of land surveying, shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice the professions of engineering or of land surveying, in this State, or to use in connection with his name or otherwise assume, use, or advertise any title or description tending to convey the impression that he is a professional engineer or a land surveyor, unless such person has been duly registered or exempted under the provisions of this Act.'

"This Board directs that I write you for an opinion on the following question:

"Are County Surveyors, appointed under the provisions of the 1923 Code, Section 10345, and performing the duties of Section 10348, required to be registered, as provided for under the provisions of Act No. 271, before they can legally practice the profession of Land Surveying in Alabama?"

I am of the opinion that your inquiry should be answered in the affirmative.

I call your attention to the definition of the term "land surveyor" under Section 2 of Act No. 271, S. 182, approved September 12, 1935 (General Acts. 1935, p. 661), which reads:

"The term 'land surveyor' as used in this Act shall mean a person who engages in the practice of land surveying as hereinafter defined. The practice of land surveying within the meaning and intent of this Act includes surveying of areas and underground mine workings for their correct determination and description and for conveyancing or for the establishment or re-establishment of land boundaries and the plotting of lands and subdivisions thereof."

Subsection (d) of Section 20 of Act No. 271, *supra*, provides the following persons shall be exempt from the provisions of this Act:

"(d) Officers and employees of the Government of the United States while engaged within this State in the practice of the profession of engineering or land surveying, for said Government."

This is the only exemption relative to governmental officials or employees.

I am of the opinion that under the provisions of Section 10348 of the Code of Alabama, 1923, the county surveyor is engaged in the practice of land surveying as defined by Act No. 271, supra, and is required to qualify and register as provided by said Act. Cf. Quarterly Report of Attorney General, Vol. XVII, p. 134.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 10, 1940.

Hon. G. H. Boyd, Register,
Tenth Judicial Circuit Court,
Birmingham, Alabama.

States—Register's Commissions—Refunds—No authority of law for refund of register's commissions erroneously paid to the state on moneys collected for state in income tax assessment appeal cases, except by order of State Board of Adjustment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 30, 1940, in which you request my official opinion as follows:

"Re: Cases Nos. 46973, 46974, 46975, 46976 and 46977.

"I am in receipt of a letter dated August 29 from Hon. J. Edward Thornton, Assistant Counsel for the State Department of Revenue, in which he states that you have suggested that I request an official opinion of your office regarding a refund this office is entitled to from the State on account of over-payment. Therefore, I would appreciate an opinion based on the following facts:

"The above numbered cases are cases appealed to the Court by several income tax payers. Under date of April 1, 1940 in each of the above cases a final decree was rendered and a judgment entered against each respective tax payer in different amounts, the costs being taxed against the State of Alabama. The actual Court costs in each of the above cases were paid by the State of Alabama under date of May 24, 1940.

"Subsequent to that date each income tax payer in each of the above cases paid into the Court, or this office, the amount of the judgment plus interest.

"Under date of August 22, 1940, I mailed five checks payable to the State Department of Revenue, representing the judgments paid into Court in the above causes, the checks totaling \$1023.06. Through error I failed to deduct 5%, or \$51.15, from the above checks, as provided by General Acts of 1931, at page 669, also Section 7278, paragraph one, of the Supplement Code of 1936.

"Please understand that the original costs, not including the 5%, have been paid in all the above cases by the State of Alabama.

"Under date of August 22, 1940, I addressed a letter to the State Department of Revenue, Attention of Hon. J. Edward Thornton, requesting that he have a warrant issued to my order for the above 5%. Of course, the writer understands that the Register of Jefferson County is on a salary basis and the aforesaid 5% would be paid into the County Treasury by the Register.

"I would appreciate it very much if you will advise me the proper method by which I can obtain the aforesaid refund of \$51.15."

A taxpayer who has through mistake or error paid to the Department of Revenue an income tax which he is not legally due, or has paid an amount in excess of which he was in fact due, may secure a refund thereof by making application therefor in the manner and within the time provided by statute. See Opinion of the Attorney General to Hon. John C. Curry, Commissioner of Revenue, State Department of Revenue, Capitol, under date of June 20, 1939, Quarterly Report of Attorney General, Vol. XV page 305, and the statutes and cases therein cited. However, this only applies to a taxpayer who makes such payment direct to the Department of Revenue. Consequently, this procedure would be inapplicable to the instant situation, and would not afford a way by which a refund could be made of commissions erroneously paid to the State by a register even though the commissions so erroneously paid were on moneys collected by the register for the State in income tax appeal cases.

I know of no statutory authority for a refund of these commissions except by an order of the State Board of Adjustment. In this connection your attention is called to the statute creating the State Board of Adjustment, Act No. 546, H. 871, approved Sept. 14, 1935, General Acts 1935, p. 1164, and to Act No. 173, H. 266 approved March 1, 1937, General Acts, 1936-37, p. 205, which amended Section 2 thereof. This latter Act, among other things, provided a statute of limitations of one year within which claims must be filed with the State Board of Adjustment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 11, 1940.

Hon. W. W. Lazenby,
Tax Assessor, Lee County,
Opelika, Alabama.

Taxation —

Where a person, on October 1st of the tax year, has, in the process of completion, a house and the materials for the completion of such house are owned by him on October 1st of the tax year, both the incomplete house and the materials, for the purpose of taxation, are to be assessed by such person at sixty per-cent of the fair and reasonable market value.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 17, 1940, in which you request my official opinion as follows:

"Paragraph M Section 10 house bill 324, 1935 Revenue Act sets out the following:

"All property brought into the State after the 1st day of October and before the Assessor has completed his assessments, shall be subject to taxation the same as if it had been held or owned in the State on the first day of October.

"My understanding is that the Assessor has from October 1st until January 1st to complete his assessments.

"I will attempt to illustrate the question that I want answered—if two parties begin the construction of a residence or business property on September 30th, I will call one A and the other B. A comes in October 1st and assesses his property; he, of course, has very little done toward construction of a building. B waits until December 30th to make his assessment, and by that time he has completed his building will say \$3,000. Also A has completed his the same value.

"Question—What will B assess his property at, I am taking for granted that A & B each have a lot that they value at \$100. A has assessed his lot at \$100, on October 1st, B on December 30th has a value of \$3100, and so has A. What must I assess B.

"It will not be long before we begin our new assessments and I am very anxious for this information."

I call your attention to the pertinent parts of Section 31 of the 1935 Revenue Act, Act No. 194, H. 324, approved July 10, 1935, (General Acts, 1935, page 256, at page 275) which provides:

"Section 31. It is the duty of every person in every election precinct to attend in person before the Assessor on the first day of the appointment in the precinct of the taxpayer's residence, and then and there render to the Assessor under oath a full and complete list of all property of which he was owner, or in which he had any interest whatever, or of which he was trustee or agent on the first day of October of that year, and to enter upon such paper the amount of fire insurance carried upon any of the property so listed. The land and improvements thereon must be separately listed."

Subsection (m) of Section 10 of Act No. 194, supra, provides:

"(m) All property brought into the State after the first day of October and before the Assessor has completed his assessment, shall be subject to taxation the same as if it has been held or owned in the State on the first day of October."

It will be observed that it is the duty of every person to assess all property of which he was the owner as of October 1st of each year, and subsection (m), supra, refers to any personal property brought into the State after the first day of October and before the assessor has completed his assessment. This office has heretofore ruled (Quarterly Report of Attorney General, Vol. XII, page 14) that where a person, on October 1st, has in the process of completion three houses and the material for the completion of the houses is on the ground, both the incomplete houses and the material, for the purpose of taxation, are to be assessed at 60% of their fair and reasonable market value as of October 1st in the tax year.

In view of the foregoing, I am of the opinion that B should assess his lot at \$100 as real property; and that all the materials owned by him as of October 1st to be used in the construction of the house should be assessed by him as personal property, since it was not so annexed or attached to the land on October 1st as to become a part of the realty. The fact that B waited until December 30th to make the assessment does not alter the situation. The assessment is based entirely on what he owned as of October 1st of the tax year. If, however, the materials are brought in from out of the State after October 1st and before the succeeding last Monday in February (which, under Section 50 of the 1935 Revenue Act is the last day the assessor has to complete his assessments), it would be necessary to assess these materials at sixty per-cent of the fair and reasonable market value of the same, as provided under subsection (m), supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 12, 1940.

Hon. Wm. J. Kern,
Clerk of Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Alabama Beverage Control Act — Alabama Alcoholic Beverage Control Board—

1. Agents of the Alabama Alcoholic Beverage Control Board are not vested with authority to execute warrants charging violations of the Alabama Beverage Control Act or with authority to make arrests for violations of said act.

2. Agents of the Alabama Alcoholic Beverage Control Board held entitled personally to same per diem and mileage as other witnesses.

3. Agents of the Alabama Alcoholic Beverage Control Board not entitled to any fees for executing warrants charging violations of the Alabama Beverage Control Act or for making arrests for violations of said act.

4. Agents of the Alabama Alcoholic Beverage Control Board held not entitled to seizure fees provided by Section 4654 of the Code of Alabama, 1923, when seizure is made by such agent.

5. Fees erroneously taxed and collected as costs should be refunded to the person from whom the same are collected.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of May 20, 1940, which is as follows:

"Please give me your opinion at the earliest possible moment as to the following:—

"Where an officer of the Alcoholic Beverage Control Board of the State of Alabama obtains an affidavit and warrant from this Court for a person violating the Alabama Liquor Law, executes the same and appears in Court as a State prosecution Witness, to whom or which department does the arrest and witness fee go?

"Does this State officer have the same right to obtain a Liquor Search Warrant from this Court as the Sheriff of Mobile County has? If so, and he seizes illegal liquor to whom or which department does this seizure fee go when collected by the Court?"

In considering the various legal propositions presented by your letter of inquiry, I deem it advisable first to consider the question of whether or not

agents of the Alabama Alcoholic Beverage Control Board have the authority to execute warrants charging violations of the Alabama Beverage Control Act (Act No. 66, H. 44, passed over Governor's veto on February 2, 1937, under Section 125 of the Constitution. General Acts, 1936-37, page 40) and to make arrests for violations of said Act.

It is my opinion that such agents do not have the authority, as agents of the Alabama Alcoholic Beverage Control Board, to make arrests, execute warrants or make seizures under warrants (except the seizure of contraband, discussed herein).

The statutes concerning arrests are to be strictly construed. There must be clear authority given to one so to do, before he is entitled to make an arrest. *Sanders v. Davis*, 153 Ala. 375, 44 So. 979. I am unable to find any provisions or provisions of the Alabama Beverage Control Act, *supra*, giving the authority to make arrests to agents of the Alabama Alcoholic Beverage Control Board. The case of *Daniels v. Milstead*, 221 Ala. 353, 128 So. 447, is particularly pertinent. The following quotation from this opinion of the Court in that case seems to settle the question as to the authority of the Alabama Alcoholic Beverage Control Board agents to make arrests, without warrants, since it deals with agents of similar authority:

"Section 673 of Game and Fish Laws of Alabama, 1929-30 provides that, 'The Commissioners of Game and Fisheries and his deputies, wardens or agents, may serve criminal process as sheriffs and constables'; but there is nothing in the game and fish laws, or the general statutes, authorizing the commissioner, his deputies, wardens, or agents, as such, to arrest without a warrant. In this respect, they have no more authority than a private person, who 'may arrest another for any public offense committed in his presence'; and where a felony has been committed, though not in his presence, and he has reasonable cause to believe that the person arrested committed it, a private person may arrest such person without a warrant. Code of 1923, Section 3267."

See also *Gambill v. Fuqua*, 148 Ala. 448, 42 So. 735.

Our research does not reveal authority in the Alabama Beverage Control Act for agents of the Alabama Alcoholic Beverage Control Board to execute search warrants. Even though the warrant be addressed to such an agent, I am of the opinion that he would not thereby be authorized to execute same, as there must be additional authorization from an officer having authority to appoint a special deputy. *Lewis v. State*, 178 Ala. 26, 59 So. 577.

Of course, if the agents of the Board be commissioned as highway patrolmen or as law enforcement officers, they would have the authority under such commission to make arrests and execute warrants.

It is my opinion that agents of the Alabama Alcoholic Beverage Control Board are not as such invested with authority to execute warrants for violations of the Alabama Beverage Control Act and to make arrests for violations of said act, and are not, therefore, entitled to any fee whatsoever for executing such warrants or making such arrests. Furthermore, a careful examination of the statutes of this State fails to disclose any provision whatsoever authorizing a fee to an agent of the Alabama Alcoholic Beverage

Control Board for executing a warrant or making an arrest. The law of costs and fees is penal, and an officer claiming a fee must be able to point to some statutory authority for the same. See Sections 3734 and 7255 of the Code of Alabama, 1923.

On the other hand, it is my opinion that such agents have the authority to make seizures without warrant under the conditions set out in Section 33 of the Alabama Beverage Control Act, supra, which reads as follows:

"Section 33. Commodities Subject to Confiscation. Any alcoholic beverages enumerated and defined herein, or other products taxable under this Act, found at any point within the State of Alabama, which said alcoholic beverages enumerated and defined herein, or other products taxable under this Act, shall have been within the State of Alabama for a period of two (2) hours, or longer, in possession of any retailer, or for a period of thirty-six (36) hours, or longer, in possession of any wholesaler or distributor not having affixed to the package as above defined the stamps, crowns or lids as above provided, are hereby declared to be contraband goods and the same may be seized by the Board, or its agents, and/or by any peace officer of the State of Alabama, without a warrant and the said goods shall be delivered to the Board for sale at public auction to the highest bidder after due advertisement, but the Board before delivering any of said goods so seized, shall require the purchaser to affix the proper amount of stamps, crowns or lids to the individual package as above defined. The proceeds of sale for any goods sold hereunder shall be turned over to the State Treasurer by the Board as other funds collected by said Board. Provided, that the cost of confiscation and sale shall be paid out of the proceeds derived from such sales before making remittance to the State Treasurer. Provided, further, that any of the goods, wares, or merchandise herein enumerated, and all such goods, wares or merchandise when offered for sale either at wholesale or retail without the stamps, crowns or lids having been first affixed, shall be subject to confiscation as hereinabove provided. Provided further, that any vehicle not a common carrier, which may be used for the transportation for the purpose of sale of unstamped articles as hereinabove enumerated shall likewise be subject to confiscation and sale in the manner as above provided for goods, wares or merchandise without stamps, crowns or lids. Provided, further, should any alcoholic beverages without stamps, crowns or lids as enumerated and defined herein be found in any vehicle which is engaged in the sale, distribution or delivery of taxable alcoholic beverages, the same shall be prima facie evidence that it was there for sale." (Emphasis supplied)

It will be noted that the authority to make the seizure is clearly stated. In this situation, it is my opinion that such agents would not be entitled to the seizure fee provided by Section 4654 of the Code of Alabama, 1923, as amended. The seizure fee therein provided for accrues to the benefit of whatever officer makes the arrest, and, as pointed out above, such agents do not have the authority to make arrests.

I have pointed out hereinabove that agents of the Alabama Alcoholic Beverage Control Board are not entitled to any fees for executing warrants or making arrests. If such fees have been taxed and collected as part of the costs, in my opinion you should refund the same to the parties from whom they were collected.

"A payment exacted by and paid to a public officer in excess of his legal fees, in order to obtain the performance of his official duties, to which the payor is entitled without such payment, is compulsory, and may be recovered back; and in such a case it is not necessary that the payor should have protested against the payment." 46 C. J. 1031, **Officers, Section 286.**

"A public officer, receiving public monies illegally and without right, may be charged with the duty of restitution." *Engel et al v. Garner*, 190 N. Y. S. 344, 116 Misc. Reps. 289.

In regard to your question concerning witness fees of agents of the Alabama Alcoholic Control Board, I advise that an agent of said Board, when summoned as a witness, is entitled personally to be paid the same per diem and mileage as are other witnesses. See opinion rendered to Hon. D. B. Borden, Clerk, Circuit Court, Hale County, Greensboro, Alabama, under date of March 28, 1938, Quarterly Report of Attorney General, Vol. X, page 190, Biennial Report of Attorney General, 1936-38, page 600, and opinions therein cited.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 12, 1940.

Hon. V. W. Elmore, Judge,
Twenty-Fourth Judicial Circuit,
Gordo, Alabama.

Probation proceedings — Witness fees —

Witness testifying on hearings to revoke probation not entitled to mileage and per diem.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 20, 1940, in which you request my official opinion as follows:

"Can witnesses subpoenaed to appear before the Judge in Circuit Court, at the request of the Judge or other officer, to testify in hearings on petition to revoke probation orders and to revoke the probation when said witnesses are testifying against the probationer be paid their mileage and attendance, and if so, how and from what funds should they be paid?"

In answer to your inquiry I am of the opinion that witnesses on probation hearings on the question of revocation of probation are not entitled to witness fees and mileage.

In an opinion of this office rendered to the Clerk of the Circuit Court of Mobile County on October 17, 1939 (Quarterly Report of Attorney General, Vol. XVII, p. 87) dealing with the question of payment of witness fees to witnesses attending hearings on probation it was observed:

"In answer to your fifth inquiry, which is:

'5. Will witnesses attending upon hearings before the Circuit Court on such applications from lower courts for probation under said act be entitled to the same pay as witnesses in criminal cases?'

"I find no authority of law for summoning witnesses in probation proceedings. The court hearing a petition under this act ordinarily would not go into the facts of the original case and try the case again. The original case is closed, so far as this proceeding is concerned, when the defendant is convicted; and the only questions which should be considered at the hearing for probation are the extenuating circumstances, the defendant's previous character, etc. to try to determine whether or not he would be likely to lapse again into crime, and if society may safely trust him at large. If the court feels that the case should be further investigated, he may call upon the probation officer to make such further investigation, under Section 3 of the Probation Act, *supra*, and report to him in writing. Section 3 is as follows:

'Section 3. INVESTIGATION. When directed by the court the probation officer shall fully investigate and report to the Court in writing the circumstances of the offense, criminal record, social history and present condition of defendant. No defendants unless the Court shall otherwise direct, shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court. Provided, however, that after conviction the court may continue the cause for such time as may be reasonable necessary to enable the probation officer to make his investigation and report. Whenever practicable, such investigation shall include physical and mental examinations of the defendant. If such defendant is committed to an institution, a copy of the report of such investigation shall be sent to the Department of Corrections and Institutions at the time of commitment.'

"Section 2 of the Probation Act, *supra*, provides in part:

'It shall be the duty of the judges of the Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court when such cases are certified to said court, as early as may be practicable, having in mind the interests of public justice to hold a hearing, under such rules and regulations and in such manner as the Court may prescribe * * *.' (Emphasis supplied)

"Under this provision, the Court may adopt such rules and regulations, not inconsistent with the law, as to it seems proper. Such rules and regulations may include provisions for the hearing of witnesses appearing voluntarily in behalf of the prospective probationer or in opposition to probation. But if such witnesses are heard on the probation proceeding, no fees can be paid from public funds for their attendance."

Said opinion deals with the question of witnesses attending hearings upon the granting of probation and considers Sections 2 and 3 of Act No. 278, S. 178, approved August 24, 1939 (General Acts 1939, page 434).

Section 4 of said Act deals with the conditions of probation, and Section 5 deals with investigations and reports by the probation officer. Section 6 reads as follows:

"Section 6. TERMINATION OF PROBATION. ARREST. SUBSEQUENT DISPOSITION. The period of probation or suspension of execution of sentence shall be determined by the court and such period may be continued or extended. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered on its minutes discharge the defendant. At any time during the period of probation or suspension or execution of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any probation officer, police officer or other officer with power of arrest upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until such probationer shall be brought before the court. Such probation officer shall forthwith report such arrest and detention to the Court and submit in writing a report showing in what manner the probationer has violated probation. Thereupon the court, after a hearing, may revoke the probation or suspension of execution of sentence and shall proceed to deal with the case as if there had been no probation or suspension of execution of sentence; and, in cases certified from a court of inferior jurisdiction, shall order and adjudge that the sentence be immediately executed."

In my judgment the same line of reasoning is applicable to witnesses and witness' fees in hearings on application for probation and hearings on revocation of probation. In both instances the probation officer submits reports concerning the defendant and presents to the court circumstances to be considered in connection with the granting or revoking of probation, as the case may be.

The premises considered, it follows that no witness fees attach in cases of witnesses appearing at hearings on revocation of probation.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 13, 1940.

Hon. Wm. A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Final record — Pleading—Complaint—Exhibits—

An exhibit, which is attached to the complaint, with an allegation in the complaint that such exhibit is a part thereof, as fully as if it were written therein, becomes a part of the complaint just as though it were written therein, and should be copied along with the complaint, and forms a part of the final record in the case.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 5, 1940, in which you request my official opinion as follows:

"In a civil suit filed in the Circuit Court which has attached to the complaint exhibits, which are referred to in the said complaint as follows, viz: 'said instruments are attached hereto and marked Exhibits A, B, C, D, E, and F, and made a part hereof, as fully as if written herein'.

"I therefore respectfully request your Honor's opinion on the following question, viz:—

"Is the duty of the Clerk of the Court to copy into the final record of said case, the said exhibits attached to the said complaint?"

In my opinion your inquiry should be answered in the affirmative.

An exhibit, which is attached to the complaint, with an allegation in the complaint that such exhibit is a part thereof, as fully as if it were written therein, becomes a part of the complaint just as though it were written therein. **State vs. Atlantic Coast Line R. Co.**, 202 Ala. 558, 81 So. 60; **Hamilton vs. Edmondson**, 235 Ala. 97, 177 So. 743; **Kiley vs. Pacific Mutual Life Ins Co.**, 237 Ala. 253, 186 So. 559.

Section 10129 of the Code of Alabama, 1923, reads as follows:

"Section 10129.—Papers to be recorded on filing.—The original pleading in civil suits, at law or in equity, the original process issuing thereon, all affidavits and bonds taken in the course thereof, must be recorded immediately after the filing thereof, or after the return of such process; and the costs of such record are taxable as part of the costs of the cause. If the original pleading, or process, or affidavit, or bond, should be lost, a copy of such record duly certified, shall stand in the place, and have the force and effect of the original. The original pleading, or the affidavit, or bond, must not be taken from the office of the

clerk or register until after the record thereof, and such record forms part of the final record of the cause."

It should be noted that this section requires that the original pleading in civil suits must be recorded immediately after the filing thereof, and that such record forms part of the final record of the cause. Since, as above stated, an exhibit, which is attached to the complaint, with an allegation in the complaint that such exhibit is a part thereof, as fully as if it were written therein, becomes a part of the complaint just as though it were written therein, and should be recorded along with the complaint, and becomes a part of the final record in the case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 13, 1940.

Mrs. Edwina Mitchell,
Associate Member,
Board of Pardons and Paroles,
Montgomery, Alabama.

Probation — Courts, from whose judgment appeal lies directly to the Court of Appeals or Supreme Court, vested with a discretionary power as to the disposition to be made of a convicted defendant, whether pronouncement of sentence has been delayed or pronounced and immediately suspended pending the time necessary for an investigation and report on defendant's application for probation.

Opinion by Assistant Attorney General Russell.

Dear Madam:

Your request for official opinion dated August 21, 1940, is as follows:

"We have been asked to advise certain circuit court judges in the state how they should proceed in the matter of applications for probation. It seems that one or two of our circuit court judges are releasing persons convicted until such time as an investigation and report can be made to the court on the application, the court assuming that the defendant's appearance bond is sufficient protection. Other judges are having the defendant confined in the county jail for such period as is necessary.

"A recent opinion from your office addressed to Honorable Robert M. Hill, Associate Member of this Board, dated June 12, advises us that the court has authority and jurisdiction to entertain and act upon applications for probation at any time before the beginning of the execution of the sentence. The sentence, as we understand it, begins im-

mediately upon the defendant being adjudged guilty and sentenced by the court unless an appeal is taken.

"Please advise us what procedure is proper in such cases."

In answer to your inquiry, special attention is called to that part of an opinion of this office rendered Hon. Robert M. Hill, Associate Member, State Board of Pardons and Paroles, Montgomery, Alabama, dated June 12, 1940 referred to in your letter wherein it was held that those courts, under the provisions of the "Probation Act" from whose judgment appeal lies directly to the Court of Appeals or Supreme Court, have authority and jurisdiction to entertain and act upon applications for suspension of sentence and for probation of persons convicted therein at any time before the beginning of the execution of the sentence imposed upon such applicants. While it is true that the execution of a sentence begins upon its pronouncement, yet when a defendant has been adjudged guilty, pronouncement of sentence may be continued to any suitable time (Corrunker vs. State, 19 Ala. App. 500, 98 So. 363 and Section 3 of the Probation Act) or as now provided by Section 1 of said Probation Act, sentence may be pronounced and the execution of the same immediately suspended as to such time designated by the court. Thus it will be seen that after a defendant has been adjudged guilty, the imposition of his sentence may be delayed or its execution immediately suspended, in the discretion of the Court.

Attention is next called to Section 3 of the "Probation Act," the pertinent part, for the purpose of this opinion, reading as follows:

" * * * No defendants unless the Court shall otherwise direct, shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court. Provided, however, that after conviction the court may continue the cause for such time as may be reasonably necessary to enable the probation officer to make his investigation and report. * * * "

From the above, it will be seen that the court is given power, after conviction, to place upon probation or release under suspension of sentence a defendant for such time as may be reasonably necessary pending a report of the investigation made for the purpose of aiding the court in determining whether or not probation should be granted.

It thus follows and is my opinion that courts, from whose judgment appeal lies directly to the Court of Appeals or Supreme Court, are vested with a discretionary power as to the disposition to be made of a convicted defendant, whether pronouncement of sentence has been delayed or pronounced and immediately suspended, pending the time necessary for an investigation and report on his application for probation. This being true, the court may, pending report of such investigation, order the convicted defendant placed in the county jail or released with or without further bond as the court may determine. It is a matter which addresses itself to the discretion of the court in each particular case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 13, 1940.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Filing Tax — Foreclosure Deed — Assignment of Mortgage—

1. Where mortgage was assigned by a National bank to an individual, no filing tax having been paid on the record either of the assignment or of the mortgage, and subsequently the assignee under the power of sale in the mortgage foreclosed the same, purchased the mortgaged property, and offered the foreclosure deed to himself for record, the deed filing tax under Schedule 46 of Section 348 of the Revenue Act of 1935 is due to be paid.

2. If at the time of said assignment no filing tax was paid for and on account of the assignment and no filing tax had been paid for record of the mortgage, the measure of the filing tax for record of the deed of foreclosure would be the value of the property or interest therein conveyed by the assignment of the mortgage at the time of assignment.

3. Such value will be the fair market value of the mortgaged property less the total amount of debt secured by prior mortgages and/or other prior liens against the mortgaged property.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 22, 1940 follows:

“Enclosed is a copy of a deed that has been filed in my office. I am dubious as to the amount of tax due on this instrument and would appreciate your advising me what would be the correct amount to collect.

“The mortgage transfer mentioned in paragraph four was recorded, but no tax was collected on it.”

The enclosed copy of the deed above referred to shows that in 1930 S and wife executed a mortgage on real property to the City National Bank to secure a debt of \$18,388.55 due October 1, 1930; that said mortgage was recorded in the office of the probate judge of Sumter County and was transferred, sold and assigned by the Bank to R Jan. 14, 1931; and that R as such transferee and assignee on March 8, 1939 foreclosed said mortgage and purchased the mortgaged property, which was subject to prior mortgages to the Federal Land Bank of New Orleans, for \$150, whereupon the auctioneer at the foreclosure sale in the names of the mortgagors, as authorized in the mortgage, executed a deed conveying the mortgaged property to said R, transferee and assignee as aforesaid.

It further appears that no mortgage filing tax was paid by the bank on the record of the mortgage (none being due to be paid) and that R paid no deed filing tax upon the record of the transfer and assignment aforementioned, although the same was due to be paid, as hereinafter shown.

The question is whether a filing tax is now due to be paid on the record of the foreclosure deed, and if so, in what amount.

In an opinion dated September 28, 1933, to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County (Opinions of Attorney General, Office Edition, Vol. 15, page 224), it was held that a foreclosure deed executed under the power of sale in a mortgage, where the mortgagee himself purchased and the mortgage filing tax had been paid on the mortgage itself, was not subject to the deed filing tax under Schedule 46 of Section 384 of the Revenue Act of 1935.

Likewise, in an opinion dated September 27, 1937 to Hon. A. M. McConnell, Judge of Probate, Limestone County, Biennial Report Attorney General, 1936-38, page 400, Quarterly Report, Vol. 8, page 309, it was held that a deed executed by the mortgagor to the mortgagee in lieu of foreclosure, the mortgagor reserving the statutory right of redemption, was not subject to such filing tax, provided the original mortgage had been filed for record and the filing tax paid thereon.

In an opinion dated July 26, 1936, to Hon. John T. Frazer, Judge of Probate, Lee County, Biennial Report Attorney General, 1936-38, page 729, Quarterly Reports, Vol. XII, page 93, it was held that the record of an assignment of a mortgage upon which the mortgage tax had not been paid was subject to the deed filing tax prescribed by Schedule 46, *supra*. See, also, opinion dated May 26, 1939, to Hon. S. G. Johnson, Judge of Probate, Lamar County, Quarterly Reports Attorney General, Vol. 15, page 229.

From the statement of facts and the memorandum of the mortgage submitted for consideration, it appears that no filing tax was paid on the original mortgage or on the assignment thereof when recorded in 1931.

The foreclosure deed now offered for record is based on the assignment, as recited therein. Inasmuch as no filing tax has ever been paid either on the record of the mortgage itself or on the assignment, I am of opinion that, without conflict with the opinions of this office above referred to, such filing tax should be paid upon the record of the foreclosure deed. Otherwise, the entire transaction will escape taxation, notwithstanding the fact that the assignee has by foreclosure vested in himself legal title to the property conveyed to him by the assignee of the mortgage.

This assignment was subject to the filing tax when recorded, but the tax was not paid. It did not come within the exception in Schedule 46, *supra*, of "transfers of mortgages * * * upon which the mortgage tax has been paid." **Quarterly Reports, Attorney General, Vol. XV, page 229, *supra*.**

Such tax is based upon the value of the property or interest therein conveyed by the instrument offered for record, at the time it was executed. Opinion of Attorney General, March 15, 1939, to Hon. M. E. McConnell, Judge of Probate, Sumter County, (**Quarterly Reports, Vol. XIV, page 183**).

Inasmuch as the foreclosure deed now offered for record recites the assignment of the mortgage in 1931 as the basis for foreclosure and was in effect executed as a memorial of that assignment, and foreclosure thereunder, I am of opinion that you should ascertain the value as of the date of assignment, of the interest, or equity of redemption, thereby conveyed, by ascertaining the actual fair market value of the mortgaged property at that time and deducting therefrom the amount of mortgage debt secured by prior mortgages to Federal Land Bank of New Orleans, subject to which the instant mortgage was executed. The remainder will represent the value of the equity of redemption at the time the City National Bank assigned its mortgage in 1931, and will be the "value" of the interest conveyed upon which to calculate the filing tax payable under Schedule 46, supra. See opinion of the Attorney General May 24, 1940, to Hon. J. Lee Smith, Judge of Probate, Chilton County, (Quarterly Reports, Vol. XIX, page 181).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 13, 1940.

Hon. W. C. Farmer,
Deputy Solicitor,
Houston County,
Dothan, Alabama.

Deputy Solicitor — Duties of —

Deputy Solicitor is not required to prepare all affidavits and warrants issued by the Judges of Inferior Courts and Justices of the Peace, but should assist in the preparation of such affidavits when requested to do so.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of August 10, 1940, in which you request my opinion as follows:

"Is it my duty as County Solicitor of Houston County, Alabama, to write out or prepare the affidavits and warrants for the issuance of same by the judges of the courts of Houston County or is it the duty of some other officer?"

In your request I notice that you refer to the office of "County Solicitor of Houston County, Alabama." A search of the local acts of Houston County has revealed no act authorizing the appointment or the election of a county solicitor for that county. Investigation has revealed that you are a deputy

solicitor for the county, appointed by the solicitor under the authority of Section 5522 of the Code of Alabama, 1923.

Your duties as deputy solicitor for the county are specifically set out in Section 5522, supra, which reads as follows:

"Section 5522. Deputy Solicitors appointed; removal.—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

It will be noted that the duty is imposed upon the deputy solicitor to represent the State in all cases in the County Court, Inferior Courts and in all preliminary proceedings. I do not believe that the law intends, however, for the deputy solicitor to prepare all affidavits and warrants issued by Inferior Courts and Justices of the Peace, but I do believe that when called upon by such officials it is the duty of the deputy solicitor to assist the Judge or magistrate in the preparation of such instruments in order that the proceedings may be in proper form.

The proper conduction of the prosecutions for the State necessarily requires an examination of the various papers incident to the trial, and, in my judgment, it is therefore incumbent upon the deputy solicitors to cooperate with the Inferior Courts and Justices of the Peace to the end that all proceedings be legal.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 13, 1940.

Hon. William A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Criminal Law — Final Record —

Organization of Court should be included in the final record of each criminal case.

Opinion by the Attorney General.

Dear Sir:

On April 25, 1940, you requested my opinion as follows:

"I respectfully request your opinion on the following question:

"Where a Grand Jury returns we will say two hundred and twenty-five indictments and the organization of the Grand Jury is set out in full on the minutes of the Court, is it the mandatory duty of the Clerk in making up the final record in said two hundred and twenty-five cases to record said organization as part of the final record in each of said cases? In other words, is it necessary to record said organization of the Grand Jury two hundred and twenty-five different times?"

On June 11, 1940, your request was answered in an opinion by this office in which it was held that the organization of the Court, being a part of the minutes of the Court, should not be included in the final record made of each criminal case.

I have reconsidered the opinion released to you on June 11th, and have come to the conclusion that I was in error. I am, therefore, withdrawing such opinion, and express hereafter my views on the question propounded by you in your letter of April 25th.

In the case of *Carmichael v. Matthews*, 134 Ala. 210, 32 So. 681, Mr. Matthews, the then Clerk of the Circuit Court of Montgomery County, Alabama, filed a petition for mandamus against Mr. Carmichael, as President of the Board of Inspectors of Convicts, asking that he request the State Auditor to draw his warrant on the Treasurer of the State in favor of Mr. Matthews in the amount of a certain cost bill which has been turned down for payment by Mr. Carmichael "upon the ground that said bill contained, under the head of 'final record' an item for which cost is charged at fifteen (15c) cents per hundred words, denominated 'organization of Court and Grand Jury', and another item under the same head denominated 'order setting day, judgment on verdict and sentence' for which cost is charged at fifteen (15c) cents per hundred words."

The Trial Court held that Mr. Matthews was entitled to be paid for both items and issued the writ of mandamus. An appeal was perfected to the Supreme Court of the State of Alabama, to which I have hereinabove referred.

It is my interpretation of the decision of the Court written by Mr. Chief Justice McClellan that the Trial Court was in error in holding that the Auditor should pay Mr. Matthews for making a final record of the 'order setting a day for the trial and of the judgment of conviction and sentence thereon.'

As to the charge for copying "the organization of Court and Grand Jury" into the final record, I construe the opinion to hold that the Clerk is entitled to compensation therefor.

I fell into error in the first opinion written to you by misconstruing Section 10126 of the Code of Alabama, 1923, which reads as follows:

"10126. Double records dispensed with.—The orders, judgments, and decrees entered upon the minutes of the court are parts of the record of the causes to which they pertain, and need not be copied into the final record. If so copied, no fee shall be charged therefor."

I construed this Section to mean that nothing should be copied into the final record which is included in the minutes of the Court. A careful reading of the Section, however, shows that only those orders, judgments and decrees which are entered upon the minutes of the Court are not to be put in the final record. I do not consider the organization of the Court and Grand Jury to be an order, judgment or decree within the meaning of Section 10126, *supra*.

The premises considered, it is my opinion that the Clerks of the Circuit Courts of the various Counties of this State should include the organization of the Court in the final record of each criminal case, and for such service are entitled to compensation as prescribed by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 13, 1940.

Hon. C. E. Sellers,
Tax Collector,
Pike County,
Troy, Alabama.

Tax Assessors — Fees —

Tax Assessor's fee for making demand on taxpayer under Section 41 of the 1935 Revenue Act should be paid when same is collected and not out of first money collected by tax collector.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion dated August 26, 1940 follows:

"Section 41 at page 31 of the 1935 Revenue Code reads in part; After the thirty-first day of December in each year, the Assessor shall in person or by deputy make a demand upon all taxpayers who have failed to make a return to him for a list of their taxable property etc.—For making this demand the Tax Assessor shall be entitled to a fee of fifty cents to be paid by the taxpayer, which shall be added to the tax receipt and collected with the tax.

"For the first time in several years this fee was charged to the taxpayers, added to and collected with the tax, for the tax year 1939. I am unable to find in the revenue code where the Tax Collector is instructed to pay these fees to the Tax Assessor at the time when he pays him his commissions out of the first monies collected for the then current year. Therefore it occurs to me that the Assessor should not be paid these fees at that time as they have not been collected and for the Collector to do so would be diverting funds due the State and County to the payment of the Assessor's fees. Would it not be right and proper to pay over these fees as they are collected at the time the Collector makes his reports and remittances to the State and County?

"My assessor is of the opinion that he should be paid his fees out of the first money collected as he is his commissions. It is my desire to be in the clear about this matter and at the same time to pay over to the Assessor his fees when he is entitled to receive them. If I am in order and you can answer these questions for me, I will appreciate your opinion at your earliest convenience."

In my opinion, the Tax Assessor is not entitled to be paid the fee provided by Section 41 of the 1935 Revenue Act out of the first money collected by the Tax Collector.

Section 41 of the 1935 Revenue Act provides as follows:

"Section 41. After the thirty-first day of December in each year, the Assessor shall in person or by deputy, make a demand upon all taxpayers who have failed to make return to him for a list of their taxable property, and such demand may be made by written notice left with the taxpayer at his residence or place of business, or sent postpaid by registered mail, with return receipt demanded, to the taxpayer's last known place of residence and it shall be the duty of such taxpayer to return such list to the Assessor on or before the third Monday in January following. For making this demand the Tax Assessor shall be entitled to a fee of fifty cents to be paid by the taxpayer, which shall be added to the tax receipt and collected with the tax."

While this fee is earned by, and accrues to, the Tax Assessor, when he makes demand upon the taxpayer, (Biennial Report of Attorney General, 1934-36, p. 580), it is charged to the taxpayer to be collected from him along with the tax. Consequently, until the same is collected, the Tax Assessor is not entitled to be paid the same, even though the fee has already been earned by him.

By no process of reasoning could it be held that he was entitled to be paid this fee out of the first money collected by the Tax Collector. The only amounts that the Tax Assessor is entitled to be paid by the Tax Collector, out of the first money collected by him for the current year, are the commissions provided for by Section 1 of Act No. 326, H. 322, approved August 31, 1939 (Gen. Acts, 1939, p. 467) which provides as follows:

"Section 1. That Section 22 of an act entitled 'An Act to provide for the General Revenue of the State of Alabama,' approved July 10, 1935, be and the same is hereby amended to read as follows: Section 22. TAX ASSESSORS COMMISSIONS. — The tax assessor shall, during the cur-

rent term of the present incumbent of said office, be paid the commission which is now provided by law; after the expiration of the present term of the present incumbent of the office of tax assessor and beginning on the first day of October, 1939 **the tax assessor shall be entitled to receive from the tax collector, out of the first money collected by him,** giving duplicate receipts therefor, one of which receipts shall be forwarded to the State Comptroller by the tax collector, **the following commissions, to-wit:**—In counties where the collections not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, do not exceed twelve thousand dollars, the rate shall be ten per cent on the first five thousand dollars, five per cent on the next four thousand dollars, and four per cent on the remainder. The commission herein provided for is to be calculated on all collections for the general fund of the State and County. In counties where collections, not including taxes on property bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, exceed twelve thousand dollars, the commission shall be as above declared up to twelve thousand dollars, and one and one-half per cent on the remainder up to fifteen thousand dollars, and one per cent on the remainder above fifteen thousand dollars. The amount of the commissions on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from States taxes shall inure to the benefit of the general fund of the State only, and shall be covered into the State Treasury to the credit of said fund. He shall also be entitled to receive two per cent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax assessor shall receive two per cent commissions on all special County or district taxes levied for school purposes; but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes." (Emphasis supplied).

The fee provided by Section 41 of the 1935 Revenue Act, *supra*, obviously does not come within the provisions of Section 1 of Act No. 326, *supra*.

Although the Tax Assessor is entitled to the 50c fee at the time the same is collected. I believe you have the implied authority to confer with the Tax Assessor and arrange to pay this fee at stated intervals, so that your office will not be unnecessarily inconvenienced by having to pay the fee as it is collected .

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 16, 1940.

Hon. Fred H. Price,
Clerk Circuit Court,
Autauga County,
Prattville, Alabama.

Clerks of the Circuit Court — Fees — Commissions—

1. Clerk of the Circuit Court of Autauga County, when acting as Ex-officio Clerk of the Inferior Court of said county, under statute providing that he shall receive for his services rendered as such clerk the same fees allowed to the circuit clerks of the State, held entitled to fees according to the schedule contained in Section 7278 of the Code of Alabama, 1923, which section sets out the schedule of fees allowed to clerks of the circuit court.

2. Such clerk, when so acting, is not entitled to receive five percent of any sum or sums collected for the State of Alabama, as provided for in Act No. 577, S. 291, approved July 28, 1931, General Acts, 1931, page 669.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of April 27, 1940, in which you request my opinion as follows:

"Kindly review Local Acts, 1935, page 82, which creates the Civil and Criminal Court of Autauga County, and General Acts, 1931, page 669, in regard to Clerks Commissions on remittances to any State Fund. I wish an opinion on the following question: Am I, as Clerk of the Circuit Court and Ex Officio Clerk of the Civil and Criminal Court, entitled to 5% commission on remittances to the State Highway Patrol Fund?

"In addition to the above, review Section 7278 and advise me what is the correct schedule of fees in regards to the Clerk of the Civil and Criminal Court."

I deem it advisable to consider and answer your questions in inverse order.

The Inferior Court of Autauga County was first created by Act No. 379, H. 893, approved September 26, 1923, Local Acts, 1923, page 244. This act has been variously amended by Act No. 233, H. 547, approved August 9, 1927, Local Acts, 1927, page 137; Act No. 158, approved June 27, 1935, Local Acts, 1935, page 82, and Act No. 56, H. 247, approved February 2, 1937, Local Acts, 1936-37, page 38. The provision of these acts pertinent to your second question is found in Section 9 of Act No. 158, supra, which reads as follows:

"Sec. 9. The Clerk of the Circuit Court of Autauga County, Alabama, shall be the Clerk of the Civil and Criminal Court of Autauga

County, Alabama, and for his services rendered as such clerk shall receive the same fees as are now, or hereafter allowed to the Circuit Clerks of the State of Alabama, which said fees are to be charged and collected in the same manner as fees are charged and collected in the Circuit Court." (Emphasis supplied)

Section 7278 of the Code of Alabama, 1923, sets out the schedule of fees allowed to the clerks of the circuit courts of this state, and, under the authority of Section 9, *supra*, you are authorized to collect fees according to this schedule when you are performing services as Ex-officio Clerk of the Inferior Court of Autauga County. Cf. opinions of the Attorney General to Hon. J. H. Hard, Biennial Report of Attorney General, 1932-34, page 219, and to Hon. R. S. Duck, Quarterly Report of Attorney General, Vol. VI, page 12.

The "five percent commission" referred to in your first inquiry is provided for by Act No. 577, S. 291, approved July 28, 1931, General Acts, 1931, page 669, which reads as follows:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive **five per cent** of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected." (Emphasis supplied)

It is to be noted that the "five per cent" therein provided for is not designated as a fee, commission or allowance, but merely "as compensation". However, in the case of *Purifoy, Auditor v. Godfrey*, 105 Ala. 142, 16 So. 701, in considering the meaning of the word "commission" as used in the statute there under consideration, (which statute provided certain commissions for solicitors), the Supreme Court said:

"The word has no technical meaning. As to particular persons, when it is used to express compensation for services rendered, it denotes, as is suggested by the Attorney General, a percentage on the amount of moneys paid out or received."

In my opinion, the converse is equally true, and the "percentage" provided for in Act No. 577, *supra*, is a "commission". Since Section 9, *supra*, merely provides that the Clerk of the Circuit Court of Autauga County shall receive, when acting as Ex-officio Clerk of the Inferior Court of Autauga County, the same "fees" as are allowed to the circuit clerks of the State of Alabama, and does not mention "commissions", it becomes necessary to determine whether or not the "commission" provided for in Act No. 577, *supra*, is included within the word "fees", as used in Section 9 *supra*. If it is so included then you are entitled to the same when acting as Ex-officio Clerk of the Inferior Court of Autauga County. Otherwise, you are not.

Admittedly, the question is not easy of solution. The words "fees, commissions, percentages and allowances" are used in both the Constitution and statutes of the State of Alabama (see particularly Sections 68 and 96 of the Constitution of Alabama, 1901) in dealing with the compensation of various officials.

In the case of **Purifoy, Auditor v. Godfrey**, supra, after speaking in regard to the word "commissions", as hereinabove set out, the Court further observed:

"The obvious meaning of the word is an allowance of compensation to the solicitor for the rendition of service, the allowance being dependent wholly upon the rendition of the service, and not upon the receiving or payment of the fees."

Thus, it seems that the Supreme Court has placed a "commission" in the category of an "allowance". And it has also held that there is a distinction between the terms "fees" and "allowances". **Stone v. State ex rel. Holcombe**, 197 Ala. 293, 72 So. 536. On the basis of the above authorities, it is my opinion that the "percentage" provided for in Act No. 577, supra, is a "commission", and, since "commissions" are in the category of "allowances", and "allowances" are distinguishable from "fees", such "percentage" is not included within the word "fees", as used in Section 9, supra, and you are not entitled to the same when acting as Ex-officio Clerk of the Inferior Court of Autauga County.

It is to be noted that the Legislature, in providing for the compensation of clerks of the circuit courts who are ex-officio clerks of the county courts of the various counties in the State of Alabama, provided that they should receive the same "fees and compensation" which they received as clerks of the circuit courts in the State, (Section 380 of the Code of Alabama, 1923), whereas, Section 9, supra, in providing for your compensation as Ex-officio Clerk of the Inferior Court of Autauga County merely provides that you shall receive the same "fees" as the clerks of the circuit courts of the State. In my opinion, the omission of the word "compensation" from Section 9, supra, is significant.

Of course, the law of costs and fees in the State of Alabama is highly penal in nature and must be strictly construed, and any public officer claiming a fee must be able to point to some clear and definite provision of law authorizing the same. Sections 3734 and 7255 of the Code of Alabama, 1923.

The reasoning and the conclusion of the opinion of this office to Hon. R. P. Barnes, Clerk of the Circuit Court, Autauga County, Prattville, Alabama, under date of March 15, 1928, Office Edition, Vol. 5, page 61, is opposed to the reasoning and conclusion of this opinion and is hereby expressly overruled. The opinion of this office to the Chief Examiner, Department of Examiners of Accounts, Capitol, under date of June 10, 1929, Biennial Report of Attorney General, 1928-30, page 458, insofar as it approves and follows the opinion to Hon. R. P. Barnes, supra, is modified to conform to this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 17, 1940.

Hon. I. C. Heck,
State Comptroller,
Montgomery, Alabama.

**Uniform Firearms Act — Expense of Administration — Counties —
State Comptroller.**

Under the Uniform Firearms Act, as amended, the expense of furnishing printed forms to be used for the administration thereof by the Sheriffs of the several counties of the State is payable by said counties respectively.

The State Comptroller not authorized to furnish such forms.

Opinion by Assistant Attorney General Matthews.

Your request for official opinion dated August 6, 1940, follows:

Dear Sir:

"We refer to Act No. 82 of the Extra Session of the Legislature, 1936, and Act No. 190 of the Extra Session of the Legislature, 1936-37, amending Sections 7 and 9 of the above Act No. 82, and also refer you to attorney General's opinion addressed to Hon. Howell Turner, Secretary of State, on August 31, 1936, and Attorney General's opinion addressed to Hon. Charles W. Lee, State Comptroller, dated September 29, 1936.

"The above Acts and opinions refer to the sale, transfer and possession of certain types of firearms, licensing of dealers and owners of such firearms, etc.

"Please advise me if it is the duty of the State Comptroller to have forms of applications and licenses printed and to furnish same to the sheriff of the various counties of the State of Alabama. If not, is it the duty of the county to furnish these supplies on form or forms prescribed by the Secretary of State?"

Act No. 82, S. 63, approved April 6, 1936 (General Acts 1936. Extra Session, page 51), as amended by Act No. 190, H. 161, approved March 2, 1937 (Gen. Acts 1936-37, Extra Session, Page 223), generally known as the Uniform Firearms Act, purports to regulate the possession and sale of pistols in Alabama. Under the Act as amended licenses are issued by the sheriffs of the respective counties whereby the licensee may carry in a vehicle or on his person a pistol for a period of not more than one year after making application to the sheriff for the license. The licensee must pay a fee of fifty cents (50c) and the fee is paid into the county treasury.

Certain printed forms prescribed by the Secretary of State have to be used for the proper administration of this statute, to-wit; the form of application, the form of the license itself, and also the form of preliminary statement to be made for the purchase of a pistol from a licensed dealer.

The statute itself does not provide for payment of the administrative expense involved in preparing and furnishing such forms.

Prior to amendment Act No. 82, *supra*, required the license fees to be paid into the State Treasury. By the amendment they are now payable into the respective county treasuries.

In an opinion dated August 31, 1936, to Hon. Howell Turner, Secretary of State (Quarterly Report Attorney General, Vol. IV, page 164), this office held that the printed forms necessary to administration of the original act should be furnished and the expense thereof be paid by the State Comptroller, inasmuch as the license fees were paid to the State.

And, again, in an opinion dated September 29, 1936, to Hon. Charles W. Lee, State Comptroller, (Quarterly Report Attorney General, Vol. IV, page 208—Biennial Report 1934-36, page 823) this office approved preparation and provision by the Comptroller of all forms for administration of the statute, (referring to the former opinion) on the ground that such procedure promoted the general purposes of the Act.

I find no construction or ruling by this office in reference to the provision of these forms since amendment of the act by Act No. 191, *supra*. By parity of reasoning, however, it would seem that inasmuch as the license fees are now paid into the treasuries of the several counties, they should pay the expense of administration arising from the necessity of printing and furnishing such forms, although the Secretary of State still prescribes them.

However that may be, the question seems to be settled by statutory law.

Section 9604 of the Code of 1923 as amended (Gen. Acts 1927, p. 693) requires that the sheriff and other county officers be allowed reasonable expenses for suitable books and stationery used for official business, on approval of the county governing body.

Likewise under Section 10205 of the Code of 1923, the county governing body must furnish books and stationery to the sheriff for his official use in the same manner that books and stationery are furnished to the clerk of the circuit court. And, under Section 6732 the governing body of the county must allow to the clerk of the circuit court the amounts properly expended by him for books and stationery for the use of his office.

In *Commissioners Court of Pike County vs. Goldthwaite*, 35 Ala. 704, decided in 1860, after construing a statute of similar import to those above referred to, the court held that the word "stationery" as used in the statute included "blank writs subpoenas, witness certificates, etc.," procured by a circuit clerk for the use of his office and actually used therein.

In *Crook vs. Commissioners Court of Calhoun County*, 144 Ala. 505, 507, 39 So. 383, in construing statutes of this nature, it was held that the word "stationery" did not include postage used by an officer in the performance of his official duties, but it was observed:

"The natural import of words is their literal sense, but this may be varied to give effect to the fundamental purpose of a statute. And the mere literal construction of a section in a statute ought not to prevail

if it is opposed to the intention of the Legislature apparent by the Statute."

In the light of this authority, it would seem beyond question that the expense incurred in providing the sheriff with such printed blank forms as may be necessary for the proper performance of his duties under the Uniform Fire Arms Act should be borne by the county.

It is reasonable to infer that the license fee of 50c payable by a person upon issue of a license under the Fire Arms Act was intended to cover the cost of administration thereof; and, inasmuch as such administration is imposed upon the sheriffs of the various counties, and such fees are paid into the county treasuries, it is natural to conclude that the counties should bear the expense.

An opinion of this office dated October 23, 1918 to Hon. A. H. Moody, Judge of Probate, Jackson County (Biennial Report, Attorney General 1918-20, p 34) held that it was the duty of the county to supply a typewriter for the use of the circuit clerk inasmuch as he was required to typewrite or print transcripts upon appeal to the Supreme Court, and that under Section 3278 of the Code of 1907, the county governing body was required to allow to the circuit clerk "the amounts properly expended by him for books and stationery for use in his office." On the analogy of that opinion it would seem clear that such supplies as blank printed forms for use by the sheriff in discharging his duties under the Fire Arms Act should likewise be paid by the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1940

Hon. F. O. McManus, Secretary,
Alabama Bridge Commission,
Montgomery, Alabama.

Bonds — Florence-Sheffield Bridge Bonds—

Resolution relative to issuance of bonds and duties of Bridge Commission under Resolution discussed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 23, 1940, in which you request my opinion as follows:

"The Alabama Bridge Commission, inc., (an agency of the State of Alabama) will appreciate an opinion on the following questions:

"1. The following agreement was made by the Alabama Bridge Commission, Stranahan, Harris & Company, Inc., James H. Causey & Company, Inc., and the First National Bank of Montgomery, Alabama which agreement we hand you separately.

"The surfaces of the approaches to the Florence Bridge, as shown and described in the original plans and specifications, called for a temporary surface. The State Highway Department, as contracting agency for the Alabama Bridge Commission, made an agreement with the U. S. Bureau of Public Roads that a permanent surface would be placed on the approaches to the said bridge within a period of two years. All work, as specified under the original contracts as called for by the plans and specifications, has been completed and the bridge opened for traffic. There remains a balance of \$75,015.80 in the Construction Fund as of May 31, 1940. The original temporary surface was severely damaged during the past winter and the State Highway Department now considers it necessary to place permanent surfaces on the approaches to the bridge.

"The question is whether the Alabama Bridge Commission can legally expend any part of the remaining balance in the said Construction Fund for the Construction of a permanent surface on the approaches to the bridge.

"2. Section 1 of Article I of a resolution approved by the Alabama Bridge Commission on December 3, 1937, which agreement we hand you separately.

"In view of the above section the question is whether the Alabama Bridge Commission can expend any money for the construction of a permanent surface to the approaches of the bridge as described in the preceding section, out of the Revenue Fund, after the remaining balance in the Construction Fund has been transferred to the said Revenue Fund.

"Sub-division D of the Section 4, Article II of the Minutes of the Alabama Bridge Commission on December 3, 1937 which we hand you separately.

"During the construction of the bridge certain insurance policies covering various kinds of insurance on the bridge for periods ranging from one to five years were paid for by the Commission out of the Construction Fund. The question is whether the Construction Fund can pay for insurance premiums extending beyond the actual construction period or whether the Construction Fund should be reimbursed by the Revenue Fund for any insurance extending beyond the period during which the bridge was actually under construction.

"Sub-section C, Section 4, of Article II of the Minutes of the Alabama Bridge Commission on December 3, 1937 which we hand you separately.

"Section 7 of an agreement between the Alabama Bridge Commission and the State Highway Commission made on the third day of December, 1937 which we hand you separately.

"The question is whether the end of the year after the completion of the bridge, during which the bond interest would be payable from the Construction Fund, is the date on which the bridge was opened to traffic or on the date when the resolution is passed by the Commission upon the certification from the State Highway Department that the said bridge is completed and the acceptance thereof by the said Bridge Commission.

"Section 3 of Article IV of the resolutions adopted by the Bridge Commission on December 3, 1937 which we hand you separately.

"The question is whether interest for the full fiscal year shall be deducted before the surplus amounting to or exceeding \$50,000 is calculated and if such \$50,000 surplus is accumulated prior to forty-five days before an interest period, shall bonds equal to \$50,000, be called by lot to be retired; and whether the amount of surplus should be calculated forty-five days prior to the end of each fiscal year to determine whether such said surplus amounts to or exceeds \$10,000."

In considering your inquiry of July 23, 1940, I will also consider your inquiry contained in your letter of July 24, 1940, which also relates to the Florence-Sheffield Bridge. This request is as follows:

"On November 29, 1939 the Alabama Bridge Commission, per its recorded minutes, did enter into a contract with the State Highway Department to participate in the cost of lighting the approaches to the Florence-Sheffield Bridge, said equipment being located in the City of Sheffield and in the City of Florence, and this lighting contract to be regarded as part of the cost of construction of the project; said original plans and specifications did not call for the lighting of these approaches by the Alabama Bridge Commission. The question is 'Can the cost of this lighting be legally paid from any residue remaining in the Construction Fund before same is transferred to the Revenue Fund?' The next question — 'Could a disbursement legally be made from the Revenue Fund to care for this item?'"

An examination of the several questions presented in your inquiries reveals that they are purely and simply one of contract. The rights and obligations of the parties are defined by the contract in the bonds, including, of course, the Resolution pursuant to which the bonds were issued. In this respect, these bonds differ not at all from any other negotiable instruments. The question is, what is that contract? Cf. *Catholic Order of Foresters v. State*, 271 N. W. 670 (N. D.), 109 A. L. R. 979, annotation at page 988.

It appears from a careful reading of the Resolution and the contract in the bonds, the pertinent parts of which will be quoted herein, that the bonds in question are to be paid solely from the "revenues derived from the use and operation of the Florence-Sheffield Bridge, its appurtenances, additions, alterations, improvements and replacements, and all lands and interest therein used therefor, as well as building thereon, remaining after providing for the payment of the reasonable and economical expenses of the maintenance and operation of said bridge, and after the creation of a reserve of \$10,000.00 to be applied solely for the payment of unforeseen con-

tingent expenses of maintenance and operation of said bridge * * *." (Article IV, Section 1, of the Resolution of the Alabama Bridge Commission (an Agency of the State of Alabama), adopted on December 3, 1937.)

The bonds specifically recite that both principal and interest are payable from these proceeds and it must be assumed that the purpose of all concerned was and is to use every dollar available from such proceeds, over and above the expenses of operation and maintenance and the \$10,000 emergency fund, as noted in the above quotation, to pay such obligations for principal and interest.

With these facts, and with the principle in mind that the bond and the resolution must be considered as a whole, and given effect according to the intention expressed (*Hubbell v. Herring*, 249 N. W. 431 (h. n. 2), Iowa), let us proceed to a consideration of your specific inquiries.

Answering your first inquiry, you are advised that in my opinion the Alabama Bridge Commission cannot legally expend any part of the remaining balance in the Construction Fund for the construction of a permanent surface on the approaches to the bridge.

You state in your inquiry that the original plans and specifications with respect to the Florence-Sheffield Bridge called for a temporary surface of the approaches to such bridge. Section 11 of Article II of the Resolution of the Alabama Bridge Commission of December 3, 1937, reads as follows:

"Section 11. Within thirty days after the bridge shall have been completed and equipped in accordance with the provisions of this resolution, which fact shall be evidenced to the Escrow Agent by a certificate stating the date of such completion, signed by the Chairman and the Secretary of the Commission and approved by the Chief Engineer of the State Highway Commission, and the project shall have been duly opened for traffic, the balance in the Construction Fund not reserved by the Commission or required for the payment of any remaining part of the cost of the project shall be added to and become part of the Revenue Fund (hereinafter created)."

You will note from this provision of the agreement that the balance in the Construction Fund, after the bridge shall have been completed and equipped in accordance with the provisions of the Resolution, and the project shall have been duly opened for traffic, other than those sums "reserved by the Commission or required for the payment of any remaining part of the cost of the project, shall be added to and become a part of the Revenue Fund. It becomes necessary to determine, therefore, whether the cost of the hard surfacing of the approaches would be a "remaining part of the cost of the project."

The answer to this is found in Sections 3 and 4 of Article II of said Resolution. Section 3 provides:

"Section 3. All payments from the Construction Fund shall be subject to the provisions and restrictions set forth in this resolution and the Commission covenants that it will not cause or permit to be paid from the Construction Fund any sums except in accordance with such provisions and restrictions."

Section 4 specifically details those things which shall be considered to be included within the "cost of the project." In Subsection (b) of Section 4 there is included "the cost of constructing the bridge and approaches thereto and the roads and all of the structures in connection therewith and the equipment thereof." It is my opinion that the "approaches" referred to in Subsection (b) of Section 4 are those "approaches" described in the original plans and specifications for the erection of such bridge. It therefore follows that the "cost of the project" to which reference is made in Section 11 of the Resolution must be limited to the cost of the approaches described in the original plans and specifications, and that when such approaches were completed, i. e., the approaches with the temporary surfacing, all that the bond contract and Resolution called for had been done. The agreement between the State Highway Department and the United States Bureau of Public Roads with respect to the permanent surfacing which would be placed on the approaches to said bridge within a period of two years, cannot, in my judgment, affect the bond agreement for none of the bondholders are or were parties to such agreement in so far as appears from the bond.

The words "reserved by the Commission", as used in Section 11 of the Resolution, cannot be construed to authorize the Commission to withhold funds for use in paying for such permanent surfacing, as this provision was, in my opinion, intended to authorize (among other things) withholding of funds for payment of the interest provided for under Subsection (c) of Section 4 of Article II of the Resolution, *infra*.

Moreover, in Section 3 of the Resolution, *supra*, the Commission specifically covenants that it will not cause or permit to be paid from the Construction Fund any sums except in accordance with the provisions and restrictions. As has already been said, in my opinion, Section 4 of the Resolution places such restrictions upon the use of the Construction Fund as to prevent the use of it by the Commission for the purpose in question.

Answering your second inquiry, you are advised that the Alabama Bridge Commission may expend moneys for the construction of a permanent surface to the approaches of the bridge out of the Revenue Fund, after the remaining balance in the Construction Fund has been transferred to said Revenue Fund. By Section 3 of Article III of the Resolution under consideration "all bridge tolls and other revenues (including accrued interest on bonds authorized by this Resolution) arising from the operation or ownership of said bridge and properties in connection therewith" are to be placed in a special fund designated as "Florence-Sheffield Bridge Revenue Fund", which fund is referred to as the "Revenue Fund". Section 5 of Article III of the Resolution is as follows:

"Section 5. No moneys in the Revenue Fund shall be paid out by said Depository except upon the request therefor signed by the Chairman of the Commission and the Secretary thereof, accompanied by a certificate of such officers certifying that such payment is necessary for the maintenance, repair or operation of said bridge under economical management, specifying the payee and the particular purpose of each such payment to be made by the Commission, except:

"(a) Said Depository shall from time to time transfer to the State Treasurer of Alabama, or to the Marine Midland Trust Company of New York, or to either of them, such sums as may be certified by the Treasurer of the Commission as being necessary to provide for the pay-

ment of the semi-annual interest upon the bonds authorized to be issued by this resolution, and:

"(b) Upon a requisition signed by the Chairman and Secretary of the Commission such sums as may be specified in said requisition for the purchase of such bonds or for the redemption prior to maturity as authorized by Article 1 of this resolution."

It will be seen, therefore, that the moneys in such Revenue Fund may be expended "for the maintenance, **repair** or operation of said bridge." Since the approach to the bridge is that part of the roadway which is essential to make the bridge accessible and convenient for public use, and hence is part of the bridge itself (*Starrett v. Inhabitants of Town of Thomaston*, 137 A. 67, 70 (Me.), Words & Phrases, "Approaches."), such moneys in the Revenue Fund would, in my opinion, be available for the maintenance, repair or operation of such approach. This conclusion finds especial foundation when it is remembered that the bondholders can look only to the proceeds of the bridge for their money, and if the approaches—the access to the bridge—are so defective as to discourage traffic, their security will be materially impaired. It is therefore my opinion that the moneys in the Revenue Fund may be expended for the construction of a permanent surface on the approaches of the bridge.

Answering your third inquiry, you are advised that in my opinion payment for insurance premiums extending beyond the actual construction period cannot legally be made, and if same have, in fact, been made, then the Construction Fund should be reimbursed by the Revenue Fund for any insurance costs extending beyond the period during which the bridge was actually under construction. Authority for this conclusion is found in Subsection (d) of Section 4 of Article II of the Resolution, wherein it is agreed that "for the purpose of this resolution the cost of the project shall include * * * (d) * * * the premiums on insurance (if any) in connection with the bridge during construction."

An additional provision for insurance—this is to protect "against liability for death or injuries to persons, or damage to property, resulting from the negligence of the Commission, its officers, agents or employees", is provided for in paragraph 2 of Section 7 of Article IV of the Resolution. It is covenanted by the Commission under this subdivision of the Resolution that such insurance will be carried "during construction, and thereafter until all outstanding bonds shall have been paid."

It will be seen that since, as has been shown above, the Construction Fund shall be "applied to the payment of the costs of the project", and since the insurance which is authorized to be included as part of the "cost of the project" is only that insurance in connection with the bridge "during construction", it would appear, and it is my opinion, that insurance premiums on the bridge after construction has been completed cannot be paid from the Construction Fund.

If, however, such moneys have been expended, it would, in my judgment, be entirely proper to reimburse the Construction Fund from the Revenue Fund, for since the Commission has agreed, as appears from Section 7 of Article IV of the Resolution, to "insure and at all times keep the bridge or such parts thereof insured, * * * until the bonds and interest thereon

shall have been paid", etc., such insurance cost would become an item of "operation" for which the Revenue Fund may be expended, as provided in Section 5 of Article III of the Resolution, quoted supra.

Replying to your question number four, it is my opinion that the end of the year, after the completion of the bridge, during which the bond interest would be payable from the Construction Fund, is a date one year after the date on which the bridge was opened for traffic and tolls began accruing, rather than the date on which the Resolution is passed by the Bridge Commission accepting the bridge.

Subsection (c) of Section 4 of Article II of the Resolution provides as follows:

"(c) Interest accruing upon the bonds prior to the commencement of and during the construction of the project and **one year after the date of completion of the construction thereof and the opening of the same to traffic, and the reasonable fees of the fiscal agent for the payment of such interest; * * ***" (Emphasis supplied)

Section 11 of Article II provides as follows:

"Section 11. Within thirty days after the bridge shall have been completed and equipped in accordance with the provisions of this resolution, which fact shall be evidenced to the Escrow Agent by a certificate stating the date of such completion, signed by the Chairman and the Secretary of the Commission and approved by the Chief Engineer of the State Highway Commission, and the project shall have been duly opened for traffic, the balance in the Construction Fund not reserved by the Commission or required for the payment of any remaining part of the cost of the project shall be added to and become a part of the Revenue Fund (hereinafter created)."

It will be seen that, in so far as the Resolution is concerned, and therefore in so far as the bondholders are concerned, the date on which the bridge is opened for traffic is the date on which the bridge is completed, such date to be evidenced by the certificate signed as provided in Section 11, supra.

That this was the intention of the parties is even more clearly revealed from a reading of Article III of the Resolution. In Section 1 thereof the Commission covenants with the holders of the bonds that before the project is "open for traffic it will fix and place in effect and charge a schedule of tolls for transit over the bridge, as shall be necessary to insure at least sufficient revenues to meet the expenses of maintenance and operation thereof," etc. Section 2 fixes the schedule of tolls. In Section 3 it is specifically provided that all bridge tolls and other revenues shall be collected by the Commission and deposited into a special fund—the Revenue Fund.

It seems clear, therefore, that it was the intention of the parties that, in so far as the bondholders were concerned, the bridge should be deemed to be completed when it was opened for traffic and the first tolls collected thereon.

I am fully aware of paragraph 7 of the agreement entered into on the third day of December, 1937, between the Alabama Bridge Commission and the State Highway Commission, in which it is stated, "The Bridge Commission, upon certification by the Highway Commission that the bridge and approaches have been completed, shall by resolution accept said bridge and approaches, and the date of the adoption of such resolution shall be deemed to be the date of completion of said project"; but, in my opinion, this provision cannot restrict in any manner the provisions in the bond resolution. Section 7 is, in my judgment, merely controlling upon the parties to the agreement in which it appears, i.e., the Highway Commission and the Bridge Commission, and so far as the rights of those parties under the agreement are concerned the date fixed in paragraph 7 will control.

Because of the length of this opinion, and in order that it may be clear to all parties, I take the liberty of restating your fifth inquiry:

"The question is whether interest for the full fiscal year shall be deducted before the surplus amounting to or exceeding \$50,000 is calculated prior to forty-five days before an interest period, shall bonds equal to \$50,000, be called by lot to be retired; and whether the amount of surplus should be calculated forty-five days prior to the end of each fiscal year to determine whether such said surplus amounts to or exceeds \$10,000."

In my opinion, answering the first part of your fifth inquiry, interest for the full fiscal year should be deducted before calculating the \$50,000 surplus to which reference is made in Section 3 of Article IV of the Resolution. Said section is as follows:

"Section 3. Whenever there shall be accumulated in the said Revenue Fund an amount, in excess of the estimated reasonable and economical expenses of maintenance and operation of such bridge for the balance of such fiscal year, plus a reserve in the above mentioned reserve for contingencies, and an amount equal to or exceeding Fifty Thousand Dollars (\$50,000.00), hereinafter called the 'Surplus', it will call for redemption by lot on the next interest payment date occurring not more than forty-five (45) days after the accumulation of such surplus, a sufficient amount of said bonds to absorb said surplus. The Commission shall call by lot for redemption on the first day of December a sufficient amount of bonds to absorb any such surplus, provided the amount thereof is not less than Ten Thousand Dollars (\$10,000.00), which shall be available for the redemption of bonds on such date."

You will note, as was stated at the outset, that the revenue from the bridge is pledged, not only to the "immediate retirement and redemption of the bonds of the issue", but as well to the payment of the interest on the bonds at the rate 4½% per annum, payable semi-annually on the first days of June and December.

Since it appears that the bonds are to be retired by lot in the event all of the bonds of the issue are not simultaneously called for redemption (this provision is found in the bond itself, as well as in the above quoted excerpt from Article IV of the Resolution), in order for the bondholders whose bonds are not retired to be protected as to their interest, it necessarily follows that before any attempt is made to retire certain of the bonds, it should

be definitely ascertained that the funds pledged to the payment of interest will not be impaired thereby. It follows, therefore, that a reserve for the full year's interest should be set up before the "Surplus" is determined.

In determining the procedure to be followed under Section 3 of Article IV, as per your request, it is necessary to look to the intention of the parties. Throughout the Resolution and the bond itself, it appears that the bonds should be called on interest payment dates only. I quote from the Resolution, Article I, Section 2, as pertinent:

"Said bonds shall * * * be redeemable, at the option of this Commission, on any interest payment date (interest payment dates are set as the first days of June and December) * * *."

I quote now from the provisions of the bond itself:

"This bond may be redeemed at the option of the Alabama Bridge Commission (an Agency of the State of Alabama) upon any interest payment date * * *."

And again:

"In the event all of the bonds of this issue are not simultaneously called for redemption, the numbers of the bond called for redemption shall be selected by lot. If this bond shall be called for redemption, **notice thereof shall be given to the holder by publication at least once thirty days prior to the date fixed for redemption.** * * *" (Emphasis supplied)

It appears, therefore, that it was understood by all parties concerned that the bonds should be callable **on interest payment dates only**, and, further, that notice at least once **thirty days prior to the date fixed for redemption** should be given any holder of a bond before his bond would be callable.

With these facts in mind, you are advised that it is my opinion that the Commission should proceed under Section 3 of Article IV of the Resolution as follows: On the forty-fifth day preceding each interest payment date, i. e., on the forty-fifth day before June 1 and December 1, the Commission should close its books for the period preceding such date and should at that time determine three things: (1) Whether there are sufficient moneys to operate and maintain the bridge for the balance of the fiscal year, including sufficient moneys to pay the interest due for such fiscal year; (2) whether there is a reserve in the reserve for contingencies, and (3) whether there is, over and above those moneys, needed under (1) and (2), an amount equal to, or exceeding \$50,000. If it determines that there is such a "Surplus", it should proceed, as soon as possible, and certainly at a time which will be at least thirty days prior to the date fixed for redemption, i. e., June 1 or December 1, as the case may be, to draw by lot a sufficient number of bonds to exhaust such surplus and to give notice as provided in the bond to the holders of those so drawn.

The same procedure should be followed with respect to the December 1 retirement period, except that it is specifically required that the Commission must call by lot for redemption on this date a sufficient amount of

bonds to absorb any such surplus, not less than \$10,000.00, which shall be available for the redemption of bonds on such date; whereas, on the June 1 date the \$10,000.00 provision does not appear.

The foregoing procedure, in my judgment, is the only procedure which can be logically worked out under the whole agreement. The forty-five day provision in Section 3 of the Resolution, *supra*, was obviously inserted to permit the Commission sufficient time to ascertain whether there, in fact, existed a "Surplus", to draw by lot the bonds to be retired, and to give the required notice. Any other construction would result in a palpable absurdity, as will appear from any effort to place such other construction upon this provision.

The reasoning applied in my answer to your first inquiry is also applicable to your inquiry of July 24. Assuming, as you say, that there was nothing in the original plans and specifications which called for the lighting of the bridge or the approaches thereto, it is my opinion that there is no authority for paying for such lighting from the Construction Fund. While it does appear that the "equipment of the bridge" shall be included in the "cost of the project" (see Subsections (b) and (f) of Section 4 of Article II of the Resolution), in the light of the reasoning applied in the answer to your question number one, the "equipment of the bridge" referred to in the foregoing paragraphs must be limited to the equipment provided for in the original plans and specifications.

It is further my opinion that if the moneys have already been paid from the Construction Fund, such fund may be reimbursed from the Revenue Fund. The Revenue Fund, as has been stated hereinabove, may be expended for the "maintenance, repair or operation of said bridge under economical management". It is very generally held that bridges may be provided with lights for making night driving safer. See 9 C. J. 478, Section 80; 11 C. J. S. 1110, Section 72(c). Also see annotation 28 L. R. A. (N.S.) 946, in which several cases are collated holding that in certain instances it is not only the right, but the duty of a city to so light a bridge as to insure its being reasonably safe for ordinary travel.

In view of the foregoing authorities, it is my opinion that the expense of lighting the bridge could be incurred from the Revenue Fund used for maintenance or operation. This being true, it is further my opinion that the moneys may be transferred from the Revenue Fund to the Construction Fund in order to reimburse that fund for moneys illegally expended therefrom.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1940

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

Highways — State Highway Department — State Highway Director — Regulations Restricting Speed —

State Highway Director not authorized to establish areas of restricted speed on public highways and to provide penalty for violation of the restriction by making same a misdemeanor, except under certain circumstances.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated August 31, 1940, follows:

"Please advise this Department if the Director has the authority to set up and establish areas of restricted speed along certain portions of the highway where restricted speed is considered necessary, and provide a penalty for the violation of this restriction making same a misdemeanor.

"The particular instance in mind is the section of the highway along the new airport."

In essence, the question is whether the State Highway Director is authorized by law to prescribe rates of speed to be observed by operators of motor vehicles within areas or along certain portions of the public highways of Alabama to be designated by himself, in the interest presumably of public safety, and to prescribe penalties for violation of this restriction" by declaring such "violation" to be a misdemeanor.

I am unable to find any provision of law to warrant any such procedure.

The Alabama Highway Code (Act No. 347, H. 391, approved August 23, 1927, General Acts, 1927, p. 348; Act No. 10, H. 25, approved January 30, 1931, General Acts, 1931, p. 7) confers upon the State Highway Department broad and comprehensive powers relating to the construction and maintenance of highways, including "the implied power to do all things incidental and appropriate to the accomplishment of the work in hand in a businesslike and orderly manner." *Union Indemnity Co. v. State*, 217 Ala. 35, 37; 114 So. 415.

Power to make rules and regulations for the construction, repair and maintenance of public roads is expressly delegated to the Department.—*Michie's Alabama Code of 1928*, Sections 1397(21) and 1397(45), *Biennial Report, Attorney General*, 1926-28, p. 604.

It is empowered also to prescribe the maximum speed permissible while driving over bridges, causeways and viaducts, and to designate such rate

of speed by appropriate signs at or near such bridges, etc., if after investigation it finds that they cannot with safety withstand vehicles traveling at a higher rate than that so designated.—Michie's Alabama Code, 1928, Section 1397(55).

This is, however, the only instance, so far as I have found, in which the legislature has expressly authorized the Highway Commission to restrict or limit speed on a public highway.

On the other hand, the legislature itself has with great particularity and elaborate detail prescribed limitations as to the speed of motor vehicles upon public highways in all other conceivable situations and under all other conditions, apparently. See Act No. 199, H. 125, approved April 21, 1936 (General Acts, 1936, p. 234), amending Section 51 of the Alabama Highway Act of 1927, *supra*.

If, therefore, the Highway Department or Highway Commission or State Highway Director has power to restrict speed in localities or at places other than bridges, causeways, and viaducts, the power must be implied as necessary to the exercise of some express power. I find no such express power.

Inasmuch as the legislature itself has legislated with such particularity as to speed, any rule or regulation otherwise promulgated with reference thereto would, so far as I can see at this time, necessarily conflict with such legislation, and would by implication amend, repeal or annul, in part at least, the legislative will as to the subject matter in question.

To uphold such a rule or regulation restricting speed in areas or along portions of the highway, to be determined and fixed by the Highway Director himself, and not by the legislature, would be to confer on him legislative rather than administrative or executive power, which, of course, cannot be done.

"In the government of this State, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

Constitution of 1901, Section 43. See also Biennial Report, Attorney General, 1928-30, p. 87.

It is not to be understood, however, that the Department is not authorized to make such reasonable rules and regulations as may be necessary and proper, restricting speed over roads or parts of roads in course of construction or repair, for the protection of workmen and to prevent damage to the road or interference with the work of construction or repair, as provided in Section 19 of the Alabama Highway Code, *supra*.

Biennial Report, Attorney General, 1926-28, p. 604, *supra*.

That, however, is as I understand it, an entirely different matter from regulating speed in areas or on roads where such work is not being done.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 20, 1940.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses — Motor Vehicles —

1. Person purchasing a new motor vehicle between October 1 and November 14 is liable for appropriate motor vehicle license for the then remaining portion of the license year, if he desires to operate the same on the public highways of the State of Alabama before November 15, in addition to license for the succeeding license year which begins on November 15, if he desires to operate the same on or after that date.

2. Such person has ninety-six hours, or four days, immediately following the purchase, within which to secure appropriate license for the then remaining portion of the license year, without being subject to any penalties for delinquency, and may purchase license for the succeeding license year at any time before November 16, without being subject to any penalties for delinquency.

3. It is the duty of the judge of probate to issue to a person who applies for a license, the license for which he applies, upon the payment by such person of the proper amount for such license.

4. It is the duty of the license inspector, and not of the judge of probate, to see to it that a person operating a motor vehicle on the public highways of the State of Alabama has the proper license therefor.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 9, 1940, in which you request my opinion as follows:

"Re: Licenses on Motor Vehicles.

"On April 18, 1940, you rendered an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, in which you used the following language:

"12. A person purchasing a new motor vehicle during the month of October, is required to purchase a motor vehicle license for the then remaining portion of the license year, which expires on November 14, and must also purchase a license for the succeeding license year which begins on November 15, if he desires to operate same on the public highways of the State, on or after that date. Opinion to Hon. Wm. Hill, Judge of Probate of Montgomery County, Montgomery, Ala., under date of April 9, 1940, a copy of which is herewith enclosed for your information.'

"I desire a clarification of this paragraph of this opinion in one respect, and would therefore appreciate your answer to the following inquiry:

"If a person purchases a new automobile on October 10, and on that makes application to my office for a license for the period beginning November 15, shall I sell such license to him if he declines to buy a license covering the period between October 10, and November 14, under Act No. 212 of the 1939 Session of the Legislature (Temporary Act 1939, page 364).

"It is my opinion that the Revenue Act of 1935, Section 353, puts the duty on the License Inspector and not on the Probate Judge or License Commissioner, to see that the taxpayer secures a license covering the period during which he wishes to operate his car.

"It is my information that the following language makes it mandatory on me to issue this license even though the taxpayer does not buy a license for a period ending November 14. I quote from the 1939 Act: 'but they shall be issued on application at any time within forty-five days prior to that date.'

"I would appreciate your prompt reply to this inquiry as this situation will be confronting me and the Judges of Probate of this State charged with the duty of issuing automobile licenses, at a very early date."

Paragraph No. 12 of the opinion rendered to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of April 18, 1940, Quarterly Report of Attorney General, Vol. XIX, page 57, was but a restatement of the holding of an opinion rendered to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of April 9, 1940, Quarterly Report of Attorney General, Vol. XIX, page 36. In the opinion to Judge Hill, Schedule 158.17 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212, H. 104, approved August 8, 1939 (General Acts, 1939, page 363) was set out. It reads as follows:

"Schedule 158.17. All motor vehicle licenses under this act shall become due on the 15th day of November of each year, and are delinquent after that date; but they shall be issued on application at any time within 45 days prior to that date."

After setting out the above quoted statutory provision, it was stated:

"In an opinion rendered to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 8, 1939, Quarterly Report of Attorney General, Vol. XVII, p. 189, construing Act No. 212, supra, it was stated:

"The act, supra, does have the effect of changing the license year on motor vehicle licenses from October 1-September 30, which was the license year prior to its passage, to November 15-November 14."

It was then concluded that, if a person bought a new motor vehicle in October of any license year, he was liable for the appropriate license for the then remaining portion of the then current license year, which license expired on November 14, if he desired to operate the same on the public highways of the State of Alabama on or before November 14, and that he was also liable for a license for the next succeeding license year, which begins on November 15, if he desires to operate the same on or after that date, which license may be purchased at any time within forty-five days prior to that date. So far as I know, the holding of that opinion has not been seriously questioned. It is my considered judgment that it is correct, and it is here reaffirmed and adhered to.

In this connection, it might be well to point out that a person who purchases a motor vehicle has ninety-six hours, or four days, immediately following the purchase, within which to secure appropriate license therefor, without being subject to any penalties for delinquency. See paragraph No. 5 of the opinion to Judge Howard, supra, and the authorities therein cited.

It is also true that a person may purchase a motor vehicle license for the succeeding license year, which begins on November 15, if he desires to operate the same on or after that date, at any time within forty-five days prior to that date. See Schedule 158.17, as amended, supra, and the opinion to Judge Hill, supra.

However, it is my opinion that if a person buys a new motor vehicle between October 1 and November 14, he may at any time thereafter before November 16 purchase a license therefor for the next succeeding license year, without any penalties whatever for delinquency on such license, irrespective of whether he buys a license therefor for the then remaining portion of the then current license year. It is further my opinion that it is incumbent upon the judge of probate to issue him a license for the next succeeding license year upon his making application therefor and upon the payment of the proper amount for the same, irrespective of whether he applies for and purchases the appropriate license for the then remaining portion of the then current license year. There is no duty devolving upon the judge of probate to require such a person to purchase the appropriate license for the then remaining portion of the then current license year before issuing him a license for the next succeeding license year upon his application therefor and the tender of the proper amount for such license. As a matter of fact, such a person is not even liable for the appropriate license for the then remaining portion of the then current license year unless he operates the motor vehicle upon the public highways of the State of Alabama on or before November 14. See paragraph No. 1 of the opinion to Judge Howard, supra,

and the authorities therein cited. But, be that as it may, it is not the duty of the judge of probate to see that a person who operates a motor vehicle upon the public highways of the State of Alabama has the proper license therefor. Rather, this is a duty that devolves upon the license inspector.

Section 353 of the 1935 Revenue Act provides, in pertinent part, as follows:

"Section 353. The State Tax Commission is hereby authorized and empowered to appoint a License Inspector for each County, provided that the same person may be appointed for more than one County. It shall be the duty of the License Inspector to scrutinize the records and stubs kept in the office of the Probate Judge, and also to examine the license records of each city or town located in the county or counties of which he has been appointed License Inspector or come to his knowledge that any person, persons, firms or corporation have failed or refused to take out license for a business or occupation for which a license is required by the State, or have failed or refused to take out license for operating any motor vehicle or trailer for which license is required by law, the License Inspector shall thereupon cite such delinquent to appear before the License Inspector at the courthouse of the County in which such citation is issued and show cause why the license or privilege tax required by law has not been paid, and at the same time shall file with the Probate Judge of the County a copy of such citation showing service on the delinquent. (a) If the License Inspector shall discover any motor vehicle being operated without a proper or legal license, he shall cite the operator of the motor vehicle, and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof. (b) The Judge of Probate must in all cases in addition to the other penalties required to be collected by him, collect the citation fee, if any, due the License Inspector before issuing any license, and in case of motor vehicle where a license is taken out in the name of person not cited the citation fee shall be collected if citation filed shows the motor number of such vehicle. When any license is due the License Inspector shall cause the delinquent to appear before the Probate Judge of the County and take out the same, but such Probate Judge shall not have the authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this Act. If such delinquent shall fail or refuse to take out license, the License Inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any Court having jurisdiction of such offense. In case of emergency the License Inspector must commence the criminal proceedings in the first place. (c) * * * Where any license issuable by the Probate Judge or Commissioner of License shall be delinquent, the same shall be subject to a penalty of 15 per cent of the amount of the license, which penalty must be collected by the Probate Judge or Commissioner of Licenses when the license is taken out together with interest at 6% from the date of delinquency. (d) It shall be unlawful for any Probate Judge or other officer to fail to collect such penalties when issuing such license. * * *"

(Emphasis supplied)

The above quoted provisions of this section, as I read them, very clearly make it the duty of the license inspector, and not the judge of probate, to see to it that a person who operates a motor vehicle upon the public highways

of the State of Alabama has an appropriate license therefor. Nor am I aware of any other provision of the statutory law of this state placing such a duty on the judge of probate.

The premises considered, it is my opinion that if a person who purchases a new motor vehicle between October 1 and November 14 applies to you during that period for a license therefor for the next succeeding license year and tenders to you the proper amount of the license, you should issue the same to him, regardless of whether or not he applies for and purchases the appropriate license for the then remaining portion of the then current license year. Of course, the license which he purchases for the next succeeding license year does not give him any right to operate his motor vehicle upon the public highways of the State before November 15, and, if he does operate his motor vehicle upon the public highways of the State before November 15, he is liable for the appropriate license for the then remaining portion of the then current license year, and, if he does not secure the same within ninety-six hours, or four days, after he purchases the motor vehicle, he is delinquent. Should he be cited for license for the then remaining portion of the then current license year by the license inspector, it would then be your duty, at the time he purchases the same, to collect the appropriate penalties and citation fees from him.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 21, 1940.

Hon. Guy Rice,
County Solicitor,
Autauga County,
Prattville, Alabama.

Sheriffs—Fees—Condemnation Proceedings—

1. The sheriff is entitled to \$1.50 for each summons or notice served on parties interested in a condemnation proceeding under the power of eminent domain.

2. There is no authority of law for the judge of probate, after the report of the commissioners and the judgment of condemnation of the court, to give notice to parties interested of the amount allotted to each individual and, therefore, no charge can be made by the sheriff for serving such notice.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 12, 1940, in which you request my official opinion as follows:

"The question has arisen in Autauga County as to the proper fees to be allowed the Sheriff for serving papers in condemnation proceedings instituted by the County to condemn land for right-of-way.

"The point in question is not the fee allowed sheriffs for summoning the Commissioners,—that appears clear, but the point is that,—there were nineteen persons connected with this condemnation and after the Commissioners viewed the property sought to be condemned, a day was set by the Commission to hear the parties interested, and a notice of the day for the hearing was issued by the Commission, placed in the hands of the Sheriff for service, which he served.

"Then, after the Commissioners reported, a notice was issued by the Judge of the Probate Court to each of the interested parties advising them of the finding and award of the Commissioners, this notice was also placed in the hands of the Sheriff for service, which he executed. Now, I find in Section 2787 of the 1923 Code this provision—'Serving any summons not herein provided for, and making return \$1.50.'

"In cases as above stated would the sheriff be entitled to \$1.50 for serving these papers or not, and if not what would be the proper allowance for such service?"

In answering the question presented in the first part of your request, which I interpret to be: What fee is the Sheriff allowed for serving notice or summons on persons whose land or property is sought to be condemned for public use under the power of eminent domain? I call your attention to an opinion of this office rendered July 6, 1939 to Hon. W. G. Culp, Sheriff, Chilton County, Quarterly Report of Attorney General, Vol. XVI, p. 9. This opinion holds that the sheriff is entitled to \$1.50 for serving each owner of property, in condemnation proceedings. See also Quarterly Report of Attorney General, Vol. XVII, p. 380.

We now come to the second part of your request, which is as follows: "What is the fee allowed the Sheriff for serving notice on parties interested in the report of the commissioners of the amount allotted each individual land or property owner?" Such a notice is not authorized by law and, therefore, no fee can be charged. I find no statute authorizing the Judge of Probate to give such notice. His decree of condemnation under Section 7491, Code of Alabama, 1923, follows the findings as set out in the report of the commissioners appointed by the court, and the final judgment or decree of the probate court is based on the report of the commissioners, and this is final unless the party or parties against whom the decree of condemnation is entered appeal to the Circuit Court as prescribed by Section 7492, Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General

September 21, 1940.

Hon. Robert M. Hill,
Associate Member,
Board of Pardons and Paroles,
Montgomery, Alabama.

**Sheriffs—Department of Corrections and Institutions—State Board
of Pardons and Paroles—**

Prisoners—Release of after serving sentence—Parole of when only
a few days of sentence remain to be served.

1. The Department of Corrections and Institutions has no authority to order the release of a prisoner who has served his sentence in the county jail before being received into the custody of the Department of Corrections and Institutions.

2. It is the duty of the sheriff to release prisoners from the county jail after they have served their full sentences.

3. A prisoner who has served his full sentence in the county jail may not be detained by the sheriff.

4. The State Board of Pardons and Paroles has the authority to parole prisoners in the county jail who have only a few days of their sentences left to serve.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 17, 1940, in which you request my opinion as follows:

"We shall appreciate an opinion on the following:

"1. Does the Department of Corrections and Institutions possess authority to order the release of a prisoner confined in a county jail on a sentence of hard labor imposed for violation of a State Law when the full sentence has been served in full by the defendant's incarceration in the county jail, such incarceration beginning the day sentence is pronounced in the trial court and continuing for a sufficient number of days for the defendant to complete the full sentence, although the defendant has not been actually received into the custody of the Department of Corrections and Institutions from the sheriff?

"2. If the Department of Corrections and Institutions does not possess such authority, who should discharge the defendant and in what manner in such cases, that is, in the case of the defendant who has completed service of his hard labor sentence in full before the Department of Corrections and Institutions has had reasonable time to receive the defendant into custody on its convict transfer truck?

"3. If the Department of Corrections and Institutions is the agency held authorized and responsible for this discharge in such case is it liable for the usual costs of court?

"4. Can the defendant in such cases be legally detained by the sheriff in jail until the transfer truck of the Department of Corrections and Institutions does pick him up although he has served his full sentence?

"5. Does the State Board of Pardons and Paroles have authority to parole the defendant in such cases although he has not been received into the actual custody of the Department of Corrections and Institutions, and although said Board is not convinced that such prisoner, 'will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society'?"

Under the facts set out in your first question, a prisoner incarcerated in the county jail, who has served the full term of his sentence before being turned over to the Department of Corrections and Institutions has remained under the control of the sheriff and has never been in the custody of the Department of Corrections and Institutions. He may, therefore, not be released by the Department of Corrections and Institutions at the expiration of his sentence, but only by the sheriff.

Section 4801 of the Code of 1923 reads as follows:

"4801. Legal Custody and charge of jail.—The sheriff has the legal custody and charge of the jail in his county, and all prisoners committed thereto (except in cases otherwise provided by law), and may appoint a jailer for whose acts he is civilly responsible."

From this section it appears that all prisoners in the county jail, whether they are to remain there or are to be turned over to the Department of Corrections and Institutions, are in the legal custody of the sheriff during all of such time that they are in the county jail. No agreement between the county and the state for the turning over of county convicts to the State will divest the sheriff of the custody of the prisoners in the county jail.

Section 3713 of the Code of 1923 provides:

"3713. Detaining convict after expiration of his sentence.—Any person who wilfully detains, imprisons, or works any convict, state or county, after the termination of the sentence of such convict, must, on conviction, be fined not less than one hundred nor more than one thousand dollars, and shall also be sentenced to hard labor for the county for not more than twelve months; and one-half of the fine, when paid, or when the fine is not paid, one-half of the amount received from such hard labor, shall go to the convict so illegally detained or imprisoned."

This Section provides that it shall be the duty of any person having control of a prisoner to release him at the expiration of his sentence. Therefore, reading together the two sections above quoted, it seems that all prisoners in the county jail are in the custody of the sheriff whose duty alone it is to release them. The Department of Corrections and Institutions has no au-

thority to release such prisoners until it has actual custody of them, and it cannot order the release of a prisoner who has served his full sentence before being turned over to said Department.

The Department of Corrections and Institutions has custody of a prisoner only after such prisoner has been turned over to the Department or to the agent of the Department presenting an order from the Department of Corrections and Institutions (Quarterly Reports of Attorney General, Vol. 12, page 168).

In answer to your second question, it is my opinion that the release of a prisoner who has served his full sentence in the county jail is to be ordered by the sheriff who has actual custody of the prisoner. A prisoner incarcerated in the county jail is, under Section 4801, *supra*, in the custody of the sheriff and is to be released by him at the expiration of the sentence (Section 3713 of the Code of 1923, *supra*.)

In determining the time at which a prisoner is to be released, it is well established that in the absence of a stay, a prisoner's sentence begins on the day sentence is pronounced. This rule was laid down by Mr. Justice Dowdell in *Corporate Authorities of Scottsboro v. Johnston*, 121 Ala. 397, 25 So. 809 in the following words:

"As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his imprisonment. *Ex Parte Myers*, 44 Mo. 279; *Wharton's Criminal Pleading and Practice* (8th Edition) Section 925."

It would appear to be the duty of the sheriff, however, to make sure that the prisoner had served his full sentence and was entitled to his release.

I reply to your third question, it is my opinion the Department of Corrections and Institutions is not liable for costs until the prisoner has been turned over to the agent of the Department for transfer to the penitentiary (Sec. 3670 of the Code of 1923; Quarterly Reports Attorney General, Vol. VII, page 81; Quarterly Reports Attorney General, Vol. XII, page 168).

It should be noted, however, that Section 3609 of the Code of 1923 makes it the duty of the Department of Corrections and Institutions to send for convicts as soon as it is notified. To emphasize that there should be no delay in transferring prisoners to the penitentiary we quote with approval the following excerpt from an opinion of this office to the Hon. Hamp Draper, Member of the State Board of Administration, found in the Quarterly Reports Attorney General, Vol. XII, page 168, at page 170:

"3. Section 3670 makes the payment of the costs under Section 3667 expressly conditioned upon the proper delivery of the convict to the proper officials. In my opinion, until proper delivery of the convict is made under Section 3610, there is no liability for the payment of such costs. Nothing herein contained shall be construed as authorizing or approving any act of the Board of Administration, or any of its agents, refusing to accept the proper delivery of a convict and in this manner attempt to prevent the payment of legal costs. I have cited to you the statutes requiring the President of the Board to direct where the convict shall be taken and requiring the delivery by the sheriff to the agent of

the Board of Administration. These are duties placed upon the Board by law, and the failure of the Board to perform such duties would render them subject to court action requiring the proper performance thereof. I do not mean to insinuate that any member of the Board of Administration would willfully fail to perform their duty in this regard, but I merely wish to make myself clear that while the payment of costs is expressly conditioned upon delivery to the proper officials, it is made the duty of the Board to supervise and arrange this delivery properly and the failure of the Board or its members to perform their duty properly should not prevent the right of the various officials to their properly earned costs."

The above is equally applicable to the Department of Corrections and Institutions and the Director thereof (See Act No. 91, H. 261, approved March 1, 1939, General Acts, 1939, page 118).

In answer to your fourth question, it is my opinion that no prisoner who has served his full sentence may legally be detained by the sheriff in jail for any reason whatsoever in connection with the offense for which he was sentenced.

In answer to your fifth question, it is my opinion that the State Board of Pardons and Paroles has the power to parole all prisoners serving sentence who are held in the jails or prisons of this State, except those under sentence of death, under authority of Section 5, Act No. 275, S. 186, approved August 25, 1939 (Gen. Acts, 1939, page 426). It is further my opinion that while the State Board of Pardons and Paroles has the authority to parole prisoners who have only a few days of their sentences left to serve, such acts are discretionary with the Board (Opp. Cit. 5, 7 & 8). The adoption of a policy of cooperation between the Department of Corrections and Institutions to prevent the expense of transporting prisoners to the state prison when only a few days of the sentences remain is, therefore, optional with the State Board of Pardons and Paroles.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 21, 1940.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Registrars—Boards of Registrars—

No authority of law for boards of registrars to hold sessions for registering voters other than specifically granted by statute.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 13, 1940, in which you request my official opinion as follows:

"I have had a number of young people come to me during the past few days who are very anxious to register and vote in General Election. My interpretation of the law is that we have no registration period this fall, the next being the first Monday in January 1941 ten days. Our Board of Registrars is willing to work a few days without pay to accommodate those that are eligible. The question is whether it would be a legal registration. Please advise me whether or not it would be legal to have the board register a few days before general election."

My answer to your inquiry is in the negative.

This office has heretofore ruled that the board of registrars does not have authority to hold sessions for the purpose of registering voters other than specifically granted by statute. **Quarterly Report of Attorney General**, Vol. XVIII, p. 158.

I call your attention to the pertinent part of Act No. 155, H. 171, approved April 21, 1936, General Acts, (Extra Session) 1936, p. 174, which provides:

"In addition to the regular registration provided in this article, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1921, and each two years thereafter, and it shall be mandatory for the board of registrars to meet on the first Monday in July, 1936, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters." (Emphasis supplied)

It will be observed that the Board of Registrars of Tuscaloosa County was required to meet on the first Monday in July, 1940, and remain in session for five days for the purpose of registering voters.

I can find no provision of law permitting the board of registrars to extend the time of registration, but such board must meet according to the mandates of the statute. There being no later time provided during the year 1940 for the board of registrars to meet, any session that said board holds would be illegal and any citizen registering at such illegal meeting would not be entitled to be placed upon the list of qualified voters. **Newton v. Herring**, 196 Ala. 455, 71 So. 679; **Quarterly Report of Attorney General**, Vol. III, p. 215; **Quarterly Report of Attorney General**, Vol. IV, p. 186.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1940.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
515 Dexter Avenue,
Montgomery, Alabama.

Kerosene Inspection Fees—

1. Kerosene blended with coloring material and used as a heating oil, cooking stove oil, illuminating oil, and as fuel oil for motor boats, subject to inspection fee provided by Act No. 28, H. 60, approved February 5, 1935 (General Acts 1935, page 51).

2. The person, firm or corporation first selling kerosene in or for importation into this State is primarily responsible for the payment of the above inspection fee.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of August 24, 1940, in which you request my opinion as follows:

"I attach hereto a letter from Mr. DeJarnette, our Revenue Examiner, which will give you the facts on which this request for your opinion is based. I desire your opinion as follows:

"1. Who is primarily responsible for the payment of the permit fee due this Department on gasoline and kerosene sales?

"2. Does the blending of kerosene oil with a coloring material constitute a fuel oil and thereby exempt it from an inspection fee?

"3. Does the original sale of kerosene to the concerns who afterward, by blending, turn it into fuel oil exempt such an original sale from the inspection fee?"

The letter attached to your request for an opinion reveals the following facts out of which your inquiry arises.

It appears that a number of oil companies over the State buy kerosene oil and after buying same they compound or blend part of it with a coloring material. This blended oil is then sold for use in heating, in cooking stoves as an illuminating fuel and as fuel for motor boats. These various oil companies do not include this blended oil in making kerosene oil sales reports to the Department of Agriculture and Industries and thereby are not paying an inspection fee on this kerosene that has been blended.

Article 19 of the Agriculture Code of 1927, as amended by Act No. 28, H. 60, approved February 5, 1935 (General Acts 1935, page 51), sets up certain standards for kerosene and like products to be sold in Alabama. There is a

fee levied by this Act for the inspection of the product to ascertain whether or not it conforms to the standards required. In Section 1 of the amended Act kerosene is defined as follows:

“* * * Section 1. **Kerosene defined.**—Statement of brands and tests required.—The term ‘kerosene’ wherever used in this Act shall be construed to mean kerosene or other like products of petroleum used for illuminating, heating or cooking purposes or for any other purposes for which kerosene is ordinarily and customarily used * * *.”

I deem it advisable to answer first your second question since this question is more or less the basic inquiry. The problem presented is whether or not the blended kerosene mentioned in your inquiry is within the purview of the definition of kerosene quoted above. I am of the opinion that the mere fact that the kerosene has been blended with a coloring material does not take it without the purview of Act No. 28, supra. Neither does the fact, in my opinion, that this colored kerosene may be used as a fuel for motor boats take it without the purview of said Act.

It will be noted that the definition of kerosene as given in the Act says: “used for illuminating, heating or cooking purposes or for any other purposes for which kerosene is ordinarily and customarily used.” The blended kerosene in question “is sold for the purpose of heating residences, for kerosene heaters and cooking stoves, and is also sold to motor boats and fishing smacks.” The admitted use of this product conforms to the exact definition in the words of the Act with the exception that an additional use is admitted. The mere fact that the bended kerosene may be used for a purpose in addition to those set out in the statute will not exempt it from the purview of Act No. 28, supra. **Grosjean v. Cooney Petroleum Company**, 181 So. 567 (La.)

Also, it will be noted that the Act reads in the defining section “or for any other purposes for which kerosene is ordinarily and customarily used.” Kerosene is ordinarily and customarily used as a motor fuel for some kinds of motors. In the case of **State v. The Standard Oil Company of Louisiana**, 168 So. 772 (La.) the Court said that experts had testified that the purposes for which kerosene was generally used were as an illuminating oil, burning oil (heating) and as a motor fuel.

In the case of **Grosjean v. The Standard Oil Company of Louisiana**, 165 So. 325 (La.) the Court was construing the applicability of a Louisiana statute to a petroleum product. The Louisiana statute (1934 Acts of Louisiana, No. 19), defining the term “kerosene” read: “The term ‘kerosene’ as mentioned in this Act is intended to include, and shall include, what is commonly known as coal oil, tractor fuel, distillate, burning oil, or by any other similar name * * *.” (Then setting out the test to be applied.) The defendant in this case had bought quantities of kerosene, mixed it with other materials and further refined it into a product called “Varsol,” which was used as a cleaning fluid. The objection to the applicability of this statute to this product was based on the fact that the statute quoted above did not include any product like the one in question. The Court, in holding that the Varsol was included within the statutory definition of kerosene, said: “The base of Varsol is kerosene, which by a process of refinement is converted into the mineral spirits which are sold to the trade under that name. The chemical process by which kerosene is converted into Varsol does not affect the base of that product and therefore it is taxable under the provisions of this Act.”

The words of the Court are particularly applicable to the situation presented here. Kerosene is the base for the "fuel oil." The process of blending does not affect the base of that product.

For these numerous reasons I advise that the blended kerosene, the subject of your inquiry, is within the purview of Act No. 28, supra, and is subject to the inspection fee provided therein. I am assuming in this conclusion that the kerosene under consideration is up to the standard fixed for such product by your Department. Cf opinion to the Chief of the Division of Weights and Measures, Agriculture Department, under date of April 30, 1929, found in Biennial Report of Attorney General, 1928-1930, page 316.

In view of the holding above, your third question need not be answered.

Your inquiry numbered one is answered, I believe, by Section 7 of Act No. 28, supra, which reads in pertinent part as follows:

"It shall be the duty of the person, firm or corporation first selling in or for importation into this State kerosene to pay said inspection fee * * *."

From the above excerpt it is clear that the person first selling kerosene in or for importation into the State is primarily responsible for the payment of the inspection fee. This duty is the same in regard to gasoline inspection fees as it is in regard to kerosene inspection fees since the words of Section 9 of Act No. 27, H. 59, approved February 5, 1935 (General Acts 1935, page 45) the act imposing the gasoline inspection fee are identical in this regard. See opinion to Hon. R. J. Goode, Commissioner of Agriculture and Industries, under date of August 21, 1937, found in Vol. VIII, Quarterly Report Attorney General, page 183; Biennial Report Attorney General, 1936-1938, page 344. Cf opinion to Hon. Seth P. Storrs, Commissioner of the Department of Agriculture and Industries, under date of November 7, 1934, found in Biennial Report Attorney General 1934-1936, page 24.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1940.

Hon. D. M. Weakley, Superintendent,
Alabama Boys Industrial School,
Birmingham, Alabama.

Alabama Boys Industrial School—Teachers' Retirement System—

Teachers, instructors and supervisors of the Alabama Boys Industrial School held eligible for membership in Teachers' Retirement System as provided for by Act No. 419, S. 362, approved September 15, 1939 (General Acts, 1939, page 559).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion dated August 31, 1940, follows:

"I shall appreciate it if you will advise me whether or not, in your opinion, the teachers, instructors, and supervisors of the Alabama Boys Industrial School are eligible for membership in the 'Teachers' Retirement Act'."

In reply, I wish to advise that in my opinion the teachers, instructors and supervisors of the Alabama Boys Industrial School are eligible for membership in the "Teachers' Retirement System", as provided for by Act No. 419, S. 362, approved September 15, 1939 (General Acts, 1939, page 559).

I call your attention to Section 1, Subsections (2) and (3), of the above named act of 1939, which provide as follows:

"Section 1. Definitions. The following words and phrases as used in this Act unless a different meaning is plainly required by the context shall have the following meanings: * * * (2) 'Public school' shall mean any day school conducted within the State under the authority and supervision of a duly elected or appointed county or city board of education and any educational institution supported by and under the control of the State: (3) 'Teachers' shall mean any teacher, principal, superintendent, supervisor, college professor, administrative officer, or clerk employed in any public school or public college within the State, or any similar employee or officer of the State Department of Education or of the Alabama Education Association, or any attendance worker fifty per cent. or more of whose salary is paid from public school funds, or any employee receiving a regular stated compensation from the retirement system. In all cases of doubt the Board of Control hereinafter defined, shall determine whether any person is a teacher as defined in this act."

You are further referred to the Code of Alabama, 1928 (Michie's Code), Chapter 4, which provides that the Alabama Boys Industrial School shall be supported by State funds. In my opinion, the Alabama Boys Industrial School is an educational institution within the meaning of the above quoted Act of 1939, and the officers and teachers named in your request come squarely within the provisions of the Teachers' Retirement System.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1940.

Hon. B. E. Brownfield,
Tax Collector, Lee County,
Opelika, Alabama.

Taxation—Tax Collector—

1. Where a person, on October 1 of the tax year, has, in the process of completion, a house and the materials for the completion of such house are owned by him on October 1 of the tax year, both the incomplete house and the materials, for the purpose of taxation, are to be assessed by such person at sixty percent of the fair and reasonable value.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of August 28, 1940 follows:

"In order to settle a difference of opinion, which has arisen, and also as a guide for our future conduct, please give me at your earliest convenience your opinion and ruling on the following questions:

"Are improvements, such as a residence, under construction, but incomplete on October 1st, subject to taxation for the tax year beginning on such said October 1st, for such portion of the work that may have been done by October 1st?

"Is there a distinction between improvements being constructed under a contract with a builder, or being constructed by the owner himself, who may purchase the material and employ 'day labor' as regards October 1st? In other words, are improvements being erected by a contractor exempt from taxation until such improvements are completed by the contractor and formally turned over to the owner?

"In case the Tax Collector grants a reduction in taxes, on order of the tax assessor, who thereby acknowledges that his office has committed an error in assessment, and which is the Collector's authority to grant the error, who is responsible for granting said error, the Tax Assessor or the Collector?

"In case the Collector is charged with such an error by the Examiner, and is made to pay the amount of the deduction, what is the recourse of the Tax Collector looking to the recovery of the money he has paid in to cover an error which he did not originate, but which he handled just as he has handled all other changes and deductions on order of the Tax Assessor's office?

"I have been unable to find rulings on these several questions, hence I will greatly appreciate your clarification of them."

This office rendered an opinion to Hon. W. W. Lasenby, Tax Assessor, Lee County, under date of September 11, 1940, which fully answers the first part of your inquiry. A copy of this opinion is herewith enclosed for your convenience.

You are advised that in my opinion it is immaterial as to whether the house is being built by a contractor or by the owner of such house, in so far as the improvements for taxation are concerned. As pointed out in the Lasenby opinion, the real estate should be assessed at 60% of its fair and reasonable value as of October 1 of the tax year. In my judgment, the same rule would apply to a house being built by a contractor, or by the owner himself. Your attention is called to the fact, however, that all such materials which are to go into the construction of such house should be assessed by the owner thereof as personal property.

I will not attempt to answer the other question of your inquiry. I am unable to understand exactly what you have in mind. If you will clarify your question or give a specific example, I will attempt to give you an answer as soon as possible.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 24, 1940.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Salary of appointee to fill unexpired term.—

An appointee to fill an unexpired term takes the salary prescribed by law at the time of his appointment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 6, 1940, in which you request my official opinion as follows:

"I will appreciate your answer to the following inquiry:

"Mr. Pilley O. Woodham was this week appointed County Commissioner for the Third District of Dale County, to fill a temporary vacancy caused by the conviction and suspension from office of Commissioner J. R. Brown on a charge of 2nd degree Forgery, such suspension being under Sections 2699 and 5294 of the Code of Alabama, 1923.

"Please advise whether Mr. Woodham will be entitled to draw the \$4.00 per diem under House Bill approved July 3, 1940, increasing per diem of County Commissioners from \$3.00 to \$4.00 per day."

Based on an opinion of the Supreme Court of Alabama in the case of **Ex Parte Houston County, et al. Poyner vs. Houston County, et al.**, 235 Ala. 304, 178 So. 535, it is my opinion that Mr. Woodham is entitled to draw his pay as provided by Act No. 662, H. 703, approved July 3, 1940, (General Acts 1939-40). This Act amends Section 6771 of the Code of Alabama, 1923, which section fixes the per diem and mileage of members of the various commissioners courts and boards of revenue of Alabama. This section, as found in the Code, fixes the pay of such commissioners and members of such boards of \$3.00 per day while occupied in the discharge of their duties as such members. This section, as amended by the Act referred to above, fixes the pay of such members at \$4.00 per day while occupied in the discharge of their duties, and went into effect July 3, 1940, and is as follows:

"Section 1. That Section 6771 of the Code of Alabama of 1923 be, and the same is hereby, amended so as to read as follows: "6771 Compensation of County Commissioners. Each member of the Court of County Commissioners, or Board of Revenue, in each of the several counties of the State of Alabama shall be paid for their services the sum of **\$4.00 per day** while occupied in the discharge of their duties as such member of the Court of County Commissioners or Board of Revenue, and 5c per mile in going to and returning from their respective courts, and the sum of \$4.00 per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing any of the County bridges or County buildings, roads or works, and 5c per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the County Treasury on the order of the Court of County Commissioners, or Board of Revenue. No allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order by the Commissioners Court previously made. The per diem and mileage of such member for services rendered when letting out, inspecting and accepting, building, or repairing any of the County bridges, roads or works, shall be paid out of any money in the County Treasury, which shall be designated and set apart by the Commissioners Court, or Board of Revenue of their respective Counties for the payment thereof. Provided, that this Act shall not operate to repeal any local law affecting any county with respect to the matters contained in this Act."

The present members of the Commissioners Court, under the general law, went into office in January, 1939. However, Mr. Woodham has just recently been appointed to fill the unexpired term of Joe R. Brown. In the case referred to above, **Ex Parte Houston County, et al. Poyner vs. Houston County, et al.**, the Supreme Court, in passing on a similar question, had this to say:

"An appointee to fill an unexpired term takes the salary prescribed by law at the time of his appointment."

See also the case of **State vs. Gunter**, 170 Ala. 165, 54 So. 283.

Therefore, it is my opinion that Mr. Woodham, not being a member of the original Commissioners Court which went into office in January, 1939, does not come under the ban of Sections 68 and 281 of the Constitution of Alabama, 1901, but it entitled to draw the sum of \$4.00 per day while occupied in the discharge of his duties as such member of the commissioners court, and \$4.00 per day while occupied in the discharge of his duties in letting out, inspecting and accepting, building or repairing any of the county bridges or county buildings, roads or works, and 5c per mile for every mile necessarily traveled by him in the performance of his duties and in going to and returning from any meeting of such commissioners court.

An opinion of this office rendered to the Judge of Probate of Randolph County on July 19, 1940 (copy enclosed) holding that Act No. 662, supra did not go into effect during the present term of the members of county governing bodies, applies only to incumbents at the time the act went into effect and is not in conflict with the above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 24, 1940.

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Milk Control Act—Stores,—Consumers—

A person may keep milk produced or acquired for exclusive consumption by himself and the members of his family in an ice box where he stores soft drinks for sale in his store, adjoining the family living quarters, provided it is not so kept for sale, without subjecting himself to the provisions of Act No. 164, H. 118, approved March 20, 1939 (Gen. Acts, 1939, p. 267).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of September 18, 1940 follows:

"A Mr. Hatfield has a little store outside of Selma, in which he and his family live and also conduct their little business. In the store side of the building he has an ice box for Coca-Cola and other soft drinks, and in this box he also puts the milk which his family uses, but does not sell, in order to keep it fresh and cold.

"Please advise as to whether he would come under the provisions of the Milk Control Act, approved March 20th, 1939 (Acts in temporary book form pages 274-5 et seq.)"

I am of opinion that Mr. Hatfield does not come under the provisions of the act above referred to (Act No. 164 H. 118, approved March 20, 1939—Gen. Acts, 1939, page 267).

Under the facts stated he keeps the milk in an ice box in his store, not for sale, but for the exclusive consumption of himself and family. He is not a milk dealer, distributor, producer, processor or producer-distributor, as defined by the Act (Section 2, page 268); nor does he come within the definition of "store" as therein defined, to-wit:

"'Store' means any establishment where milk is sold directly to the consumer other than for consumption upon the premises where sold." (P. 269).

As he is not engaged in selling milk in his store, his store is not a "store" within the meaning of the definition, and is not therefore subject to be licensed as required by Section 9 of the Act (p. 274).

The act is not directed at consumers, apparently. A "consumer" is defined as "any person who purchases milk solely for personal use or the use of his household." (P. 269).

Mr. Hatfield is clearly a "consumer" only, so far as the act is concerned. No good reason appears why he may not keep his milk fresh and cold in his own ice box, even though it be located in his store.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 24, 1940.

Dr. Douglas L. Cannon,
Director of County Organization,
Department of Public Health,
CAPITOL.

Motor Fuels and Lubricating Oils—Filling Stations—Sale of to State Employees for use exclusively in Discharge of Duties—Sign or Placard Showing Price and Amount of Tax—

Filling station operators selling motor fuels and lubricating oils to state employees for use exclusively in discharge of their duties as such employees for which they are reimbursed by the State, may deduct from the posted price plus amount of tax shown separately

on sign or placard, as required by Act No. 607, H. 728, approved July 2, 1940, the amount of federal gasoline and/or lubricating oils tax otherwise payable on such purchases.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of September 14, 1940 follows:

"Substitute for House Bill 728 enacted by the last Legislature regulating the sale of motor fuel and lubricating oils is being interpreted by certain filling station operators as forbidding them to deduct federal tax on gasoline and oil to employees of Alabama's several county health departments.

"On the other hand, examiners of accounts maintain that the tax cannot be paid by these individuals since they operate on expense accounts of budgets contributed to by the State of Alabama. In view of this confusion, it is asked that you render an opinion in order that both filling station operators and county health department personnel may know how to proceed.

"In this connection it may be said that filling stations in the smaller centers of population are not always equipped with tax exemption forms and rather than to be burdened with them often enter into an agreement with county health departments whereby a discount equivalent to the tax is offered.

"I am, therefore, asking you to rule on two points:

"(1) Does Substitute for House Bill 728 make it impossible for a filling station operator to grant exemption from the federal tax when purchases of gasoline and oil are made by employees of county health departments; and

"(2) Would it be in violation of Substitute for House Bill 728 for a filling station operator to grant to employees of county health departments a reduction in the price of gasoline and oil equivalent to the federal tax?"

Act No. 607, H. 728, approved July 2, 1940, regulating retail sales of motor fuel and lubricating oil in Alabama reads in part as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to sell or offer for sale at retail, for use or consumption in any motor vehicle or to deliver into any motor vehicle for actual or apparent use therein, any product whatsoever for use in supplying, creating or generating motive power to such motor vehicle, or lubricating oil for such motor vehicle, unless such person, firm or corporation shall conspicuously and plainly post on the pump or stand from which delivery is made a sign or placard, stating the **price or prices** of each such product, **amount of tax to be stated separately**, and so that such prices can be read

and easily distinguished by brand or other designation in legible words, letters and figures of uniform size and dimensions, not less than one inch in height, which said sign or placard shall be so located and placed that it may easily be seen and read by purchasers or prospective purchasers of such product or oil.

"Section 2. Be It Further Enacted, That it shall be unlawful for any person, firm or corporation to sell or offer for sale at retail, for use or consumption in any motor vehicle, or to deliver into any motor vehicle, for actual or apparent use therein, any product whatsoever for use in supplying, creating or generating motive power to such motor power to such motor vehicle, or lubricating oil for such motor vehicle, at **any price or prices**, except the exact **price or prices** contained on the sign or placard required by this Act, or to offer, deliver, grant, allow, give or promise, any actual prospective, contingent, immediate or future benefits, concessions, discounts, refunds, premiums, or gratuities of any kind or nature whatsoever, which in any degree, manner or extent, shall be calculated or intended to effect or accomplish a sale of such product for other than said posted **price or prices**." (Emphasis supplied)

Said act also provides in Section 4 thereof that a violation of the act shall constitute a misdemeanor punishable by fine and/or imprisonment. Jurisdiction over such offenses is conferred on Justices of the Peace Courts (Section 5).

A federal tax is imposed upon the producer or importer of such motor fuels and oils. 26 U.S.C.A. Sections 3412 and 3413, U.S.C. (Cong. Ser.) No. 5, p. 266 (1940)

Under regulations prescribed by the Commissioner of Internal Revenue said federal tax is not imposed with respect to the sale of motor fuels and oils for the exclusive use of any state or political subdivision thereof. 26 U.S.C.A. p. 193, Sec. 3442. In other words, sales to states or their political subdivisions, for their exclusive use, are exempt from said federal taxes, the procedure for exemption being prescribed by the Commissioner.

In the above quoted Section 1 of Act No. 607, it is to be noted that in "stating the price or prices" on the "sign or placard" therein required to be displayed for the view of purchasers, the "amount of tax" it "to be stated separately."

Section 2 of said Act forbids sales "at any price or prices, except the exact price or prices contained on the sign or placard," aforementioned.

The problem would seem to be to determine whether "price or prices" includes the amount of tax shown on the sign or placard separately from such "price or prices." I must, therefore, determine if I can, after consideration of the act in its entirety, what is meant by the words "price or prices," and whether or not the amount of tax is also a part of the "price or prices."

I am of opinion that, construing the act, as all penal and criminal acts must be construed, strictly and most favorably to those thereby subjected to penalties or punishment (State vs. One Black Horse Mule, 207 Ala. 277, 92 So. 548; Dumas vs. State 17 Ala. App. 492, 86 So. 162; Anderson v. City of

Birmingham, 205 Ala. 604, 88 So. 900), it was not the legislative intent to include in the words "price or prices" the amount of tax payable with respect to such sale in cases where no such tax was payable or where such sales were exempt from motor fuel and oil federal or state taxes.

It is said that any statute of which the meaning is doubtful, should be given a rational and sensible construction. *Shephard vs. Clements*, 224 Ala. 1, 141 So. 255; *Birmingham Railway Light & Power Co., vs. Green*, 4 Ala. App. 417, 58 So. 801. Also that statutes in derogation of the common law, as this statute most certainly is, must be strictly construed. *Gilbert vs. Talladega Hdwe. Co.* 195 Ala. 474, 70 So. 660; *Cook vs. Meyer*, 73 Ala. 580; *McDonald vs. Murman Ship Building Corporation*, 210 Ala. 611, 98 So. 387.

In harmony with these canons of construction, it is difficult to believe that the legislature intended to require payment as a part of the price of gasoline of what theretofore had not been payable or included in such price, on account of tax exemption.

Apparently the object of the act is, in the alleged exercise of the police power, to prevent secret rebates by retail vendors of gasolins and motor oils to favored customers as a means of inducement to obtaining their patronage. This is clearly shown by the concluding verbiage of Section 2 of the act, above quoted. Deduction from the posted "amount of tax," (presumably including all tax, state, municipal and federal) of the amount of federal tax as to which a purchaser is exempt, obviously cannot be said to violate the spirit of the act or operate as an inducement to patronage.

I am of opinion, therefore, that with respect to sales by filling station operators of gasoline and motor oils to employees of the Department of Public Health for use exclusively while engaged in the discharge of their duties as such employees, for which such employees are reimbursed by the State, the operators may without violation of the law deduct the amount of the aforementioned federal taxes from the posted amount of tax or from the price which otherwise would be payable by the purchaser.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 24, 1940.

Dr. Douglas L. Cannon,
Assistant in Administration,
Department of Public Health,
State of Alabama,
CAPITOL.

State Health Department—

Allocation of Conditional Appropriation—

State Health Department may include in annual budget, if approved by the State Board of Health, allocation of part of the conditional appropriation made by Section 1, VI, 1, of the General Appropriations Act of 1939, as contribution to county health units, notwithstanding budget also contemplates allocation of full sum specifically appropriated therefor by the Legislature.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

This is to acknowledge receipt of your letter of September 19, 1940, which is as follows:

"Part VII of the General Appropriations Act, approved August 24th, 1939 (page 414, General Laws, Session 1939) allots annually to this department a stated amount of \$505,000, and a conditional appropriation in addition thereto of \$25,000 for other expenses. Of the fixed appropriation of \$505,000, the sum of \$202,900 is intended for county health work.

"In the fiscal year which is to conclude on September 30, 1940, it is found that this last referred to sum should be augmented by \$6,000 out of the conditional appropriation of \$25,000 which has been made available and is now in the State Treasury to the credit of the State Department of Health. There is no question in the mind of the State Health Officer that it was the intent of the Legislature to permit the use of the \$25,000 appropriation to supplement the fixed appropriation in any of its subdivisions except in the case of Item I (salary of State Health Officer). However, it is the view of the State Health Officer that he should have an expression from you in the matter before allocating \$6,000 of the sum to county health work.

"In your deliberations you may want to refer to S. 308 relating to the expenditure of funds made available for the conduct of public health work in this State and to be found on page 771 of the General Acts of Alabama, Regular Session, 1935."

In my opinion the State Department of Health may augment the appropriation for contribution to county health units, noted in your request, with any part of the \$25,000 conditional appropriation noted therein which it determines is necessary and proper.

Section I, VII, 1 of Act No. 247, S. 239, approved August 24, 1939, (General Acts 1939, page 411) the General Appropriation Act, provides in pertinent part as follows:

"Section 1. That there is hereby appropriated for the ordinary expenses of the Executive and Judicial Departments of the State, for the interest on the public debt, and for the public schools for each of the four fiscal years ending respectively September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, to be paid out of any monies in the State Treasury not otherwise appropriated, the several sums of money hereinafter specified or so much thereof as may be necessary:

VII. CONSERVATION OF HEALTH AND SANITATION: 1. Health Department: For compensation of State Health Officer \$3600.00. For salaries, for other expenses and for pasteur treatments \$223,500.00. For contribution to county health units \$202,900.00. For subsidy to counties for the treatment of tuberculosis \$75,000.00, \$505,000.00. For other expenses conditional upon the approval of the Governor, \$25,000.00."

It is true that there is contained in said appropriation provision the specific allocation: "For contribution to county health units \$202,900.00." This is followed, however, with the further provision: "For other expenses conditional upon the approval of the Governor \$25,000.00."

The phrase "other expenses" as used in the appropriation statutes has been construed by the Supreme Court in the case of *Lee, Comptroller, v. The City of Decatur*. 233 Ala. 411; 172 So. 284. There the Court considered the provisions of Section 1, XII, 1, of the General Appropriations Act of 1935, Act No. 373, H. 249, approved September 6, 1935 (General Acts 1935, page 798-799), which provided:

"Section 1. That there is hereby appropriated for the ordinary expenses of the Executive, Legislative and Judicial Departments of the State, for the interest on the public debt, and for the public schools, for each of the four fiscal years ending respectively September 30, 1936, 1937, 1938 and 1939, to be paid out of any moneys in the Treasury not otherwise appropriated, the several sums of money hereinafter specified or so much thereof as may be necessary:

* * * *

XII. HIGHWAYS AND BRIDGES. 1. (1) For salaries of three Highway Commissioners @ \$3,600.00-\$10,800. (2) For interest and sinking funds on outstanding highway bonds so much of the gasoline taxes and motor vehicles licenses collected, as may be necessary to pay the same. (3) For maintenance and construction of roads and bridges, and other expenses of the highway department, the rest and residue of gasoline taxes, motor vehicle licenses, and all other revenues coming in or accruing to the Highway Department, by virtue of Federal Aid, Statutes of Alabama, or otherwise." (emphasis supplied).

In construing the meaning of the phrase "and other expenses of the highway department," as employed in that statute, the Court said:

"The outlay for roads and bridges and 'other expenses' of the Highway Department can only mean those expenses which the Department is by law authorized to incur***"

The allocation by the State Department of Health of funds conditionally appropriated to that Department, "for contribution to county health units," unquestionably is "an expense which the department may lawfully incur."

This view is fortified when one considers Act No. 334, S. 308, approved September 6, 1935 (General Acts 1935, page 771), which, in Section 1 thereof, provides:

"Section 1. All funds or appropriations now or hereafter made available for the preservation, furtherance, or maintenance of public health in this State shall be expended in accordance with an annual budget prepared by the State Health Officer with the approval of the State Board of Health for the purposes enumerated in Section 1159 of the Code of Alabama of 1923 and for such other purposes deemed essential and necessary by the State Board of Health for the protection of the public health of the State, provided however that the total expenditures provided for in said budget shall not exceed the total funds or appropriations made available for public health work during that year. A copy of said budget shall be filed annually in the office of the State Comptroller."

So that, construing these provisions of the law together, it is my opinion that if the State Health Officer provides in the annual budget as originally prepared, or as amended, for the allocation of \$6,000.00 of the \$25,000.00 conditional appropriation in question, for contribution to county health units, and the original or amended budget is approved by the State Board of Health, the stated sum of the conditional appropriation may be legally allocated for said purposes, notwithstanding the fact that the entire sum of \$202,900.00 allocated in the Appropriation Act for said purpose may have been paid in full.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 24, 1940.

Hon. Henry W. Sweet,
Associate Member,
Commission of Jefferson County,
Birmingham, Alabama.

Boards of Equalization, duties—Taxation—

Boards of Equalization must inspect, review, revise and fix the value of all property, both real and personal, returned to or listed with the tax assessor for taxation each year with the exception of property which is required to be assessed by the State Department of Revenue.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated September 9, 1940 follows:

"Please give me your opinion as to whether or not the County Boards of Equalization are to equalize assessments on personal property as well as real property, and oblige."

In my opinion your inquiry should be answered in the affirmative.

Section XIII of Act No. 143 S. 14, approved March 15, 1939 (Gen. Acts, 1939, page 178) provides in part as follows:

"Section XIII. It shall be the duty of the Boards of Equalization to inspect, review, revise and fix the value of all the property returned to or listed with the tax assessor for taxation each year; provided, however, nothing in this Act shall be construed to require the tax assessor or Boards of Equalization to value any property required by the law to be assessed for taxation by the State Department of Revenue." (Emphasis supplied).

It will be noted the above section provides that the Boards of Equalization must inspect, review, revise and fix the value of **all the property** returned to or listed with the tax assessor for taxation each year with the exception of the particular property which is required by law to be assessed by the State Department of Revenue. This being true, inasmuch as the law requires a person to list both his real and personal property with the tax assessor for taxation each year, (Section 10 et seq. of Chapter II of the 1935 Revenue Act) it is my opinion that the word "all" as used in Section XIII, supra, includes both real and personal property. Also Section 1 of Article I of the 1935 Revenue Act, which deals with the taxable property of the State, defines the word "property", as used therein, to include both real and personal property.

I therefore advise you that it is the duty of the Boards of Equalization to inspect, review, revise and fix the value of all property, both real and personal, returned to or listed with the tax assessor for taxation each year with the exception of the particular property which is required by law to be assessed by the State Department of Revenue.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 24, 1940.

Hon. J. H. Madison,
Rabies Inspector, Walker County,
Parrish, Alabama.

Rabies Act—Time for Inoculation—

Under Act No. 184, S. 92, approved March 17, 1939 (General Acts 1939, page 329), dogs must be inoculation against rabies each year on or after January 1, and before September 1.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of September 11, 1940, in which you request my opinion as follows:

"Please give me your opinion of the following:

"Act of the Legislature approved March 17, 1939, relating to Rabies.

"Under Section 3 of the act as amended, if a dog is inoculated after September 1st, of the year in which he is inoculated against rabies, could the owner of the dog wait one year from that date of inoculation before he would be required under the law to inoculate?

"If a dog is inoculated after September 1st, of this year would he be required to inoculate again before September 1, of 1941?

"If a dog is inoculated on January 1st, of 1940, would this dog be subject to inoculation under the law before September 1, 1941?

"I am very anxious to get your opinion from you as some of the justices of peace are under the impression that the owner has one year from the date of inoculation, regardless of when the inoculation took place.

"Is the period for inoculation from September 1st, to September 1st, of each year?"

Section 3 of Act No. 200, S. 71, approved March 2, 1937 (General Acts 1936-37, page 230), as amended by Act No. 184, S. 92, approved March 17, 1939 (General Acts 1939, page 329), reads in pertinent part as follows:

"Section 3. **Inoculation of Dogs Required.**—Prior to September 1 of each year, every owner of a dog, not confined at all times to an enclosed area, or on a leash, or muzzled, shall cause such dog to be inoculated against rabies by the Rabies Inspector or a competent Veterinarian. * * *

The obvious purpose of the Act is to have dogs inoculated against rabies once every year. The date fixed in the Act as a deadline is merely for the purpose of enforcement thereof. See Opinion to Dr. J. N. Baker, State Health Officer, under date of August 26, 1938 (Quarterly Reports Attorney General, Vol. XII, page 152).

The Act does not specify the time each year for the inoculation. However, it does say before September 1 of each year. Since there is a penalty provided for violation of this Act, it must be strictly construed. **Gunter v. Leckey**, 30 Ala. 591; **Young v. State**, 58 Ala. 358; **Dumas v. State**, 17 Ala. App. 492, 86 So. 162; **Westernhaven v. Dunnavent**, 225 Ala. 400, 143 So. 823. Therefore, I am of the opinion that a dog must be inoculated before September 1 of each year. The "year" referred to in the Act is clearly the calendar year, January 1 through December 31. This construction is strengthened by a reference to other provisions of the Act. It will be noted that in Section 2 of the Act, the rabies inspector is to be appointed annually prior to January 15

and is to hold office through December 31 of that year. Also, in Section 4 it will be noted that the tag of the dog is to bear the "number and year" of the inoculation and does not read "years" as it would necessarily have to read under any other construction.

Therefore, every dog must be inoculated every year at some time between the dates of January 1 and September 1 of that year regardless of the date of his previous inoculation.

If a dog is inocuated after September 1, 1940, he would have to be inoculated again before September 1, 1941.

If a dog is inoculated on January 1, 1940, he would not have to be inoculated again before September 1, 1940, but would have to be inoculated before September 1, 1941.

As I have pointed out above, the period for inoculation is January 1 to September 1 of each year. In other words, every dog must be inoculated, at any time, on or after January 1 and prior to September 1 of each year, regardless of the date of his previous inoculation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 25, 1940.

Hon. A. R. Forsyth,
Director of Finance,
State Capitol.

Appropriations—

1. Appropriations for the purchase of lands or the erection of buildings or a new construction do not lapse at end of fiscal year.
2. Sum conditionally appropriated for Department of Corrections and Institutions for purpose of erecting a prison for women at Wetumpka, and released by Governor before end of fiscal year, held not to be included in "surplus" accruing to teachers retirement fund under General Acts 1939, p. 807 (Act No. 518 H. 494, approved September 21, 1939).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 11, 1940, in which you request my opinion as follows:

"Among the appropriations for the Fiscal Year ending September 30, 1940, is one in the amount of \$125,000.00 for the Department of Corrections and Institutions for the construction of additional buildings and purchase of land, made conditional upon the approval of the Governor. I refer you to Subsection 2 of Section IX, Act No. 247, General Acts of Alabama, 1939, page 416.

"Since said appropriation was included in the probable disbursements for the present Fiscal Year, it is desired to treat this appropriation as an encumbrance against the current Fiscal Year's cash balance.

"As the appropriation in question has been approved by the Governor, please advise if the sum of \$125,000.00 should be allotted upon requisition of the Department of Corrections and Institutions, and if allotted, should said amount be carried forward in the General Fund to be available to the Department of Corrections and Institutions until the attainment of the object of such appropriation, namely, the erection of a prison for women at Wetumpka. Please advise further if said sum should be included in the surplus which under Act No. 518, House Bill No. 494, approved September 21, 1939, General Acts of Alabama, 1939, page 807, is to be estimated at the close of this Fiscal Year ending September 30, 1940."

Section 20 of the Budget and Financial Control Act of 1932 (Act No. 37, S. 87, approved September 27, 1932, General Acts, 1932, page 35), as amended by Act No. 144, S. 34, approved March 16, 1939 (General Acts, 1939, page 190, 196) provides, in pertinent part, as follows:

"20. ALLOTMENTS: Before an appropriation for any purpose to any department, board, bureau, commission, agency, office or institution of the State shall become available, there shall be submitted to the Department of Finance not less than twenty days before the expiration of the last period for which an allotment has been or shall have been made, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the period for which allotments are made. Allotments shall be made for such length of time as may be determined to be appropriate and convenient by the Department of Finance, with the approval of the Governor, but not (sic) allotment (except for the acquisition of land, permanent improvements or other capital projects) shall, in any event, be for a period of longer than three months. * * *

"The Comptroller in the Department of Finance shall set up such allotment on his books and be governed accordingly in his control of expenditures. Allotments of appropriations made for the acquisition of land, permanent improvements, and other capital projects may, however, be allotted in one amount by major classes or projects for which they are expendable without regard to allotment periods. * * *"

You will note from the foregoing provision that allotments of appropriations made for the acquisition of land, permanent improvements, etc., may be made without regard to allotment periods. You will note also that the restriction of three months on allotments is not applicable to those appropriations for the acquisition of land, permanent improvements, or other capital projects.

The appropriation in question to the Department of Corrections and Institutions is found in Subsection 2 of Section IX of Act No. 247, S. 239, approved August 24, 1939 (General Acts, 1939, page 411, 416) and is as follows:

"For the construction of additional buildings and purchase of lands, conditional upon the approval of the Governor, \$125,000.00."

You state that this conditional appropriation has been released by the Governor.

Section 22 of the Budget and Financial Control Act of 1932, *supra*, as amended by the 1939 Act, *supra*, contains specific reference to the lapse of appropriations for the purchase of land or erection of buildings, and provides:

"Appropriations for the purchase of lands or the erection of buildings or new constructions shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made."

Cf. Southern Industrial Institute v. Lee, 234 Ala. 404, 175 So. 365; *In re: Opinion of the Justices*, 234 Ala. 555, 176 So. 367.

It would appear, therefore, and you are so advised, that if the appropriation in question is allotted as required by Section 20 of the Budget and Financial Control Act, as amended, *supra*, such appropriation will not lapse and should be carried forward in the General Fund at the close of the Fiscal Year to be available to the Department of Corrections and Institutions, to the extent that there are any moneys in the General Fund to pay such appropriation, until the attainment of the object of such appropriation.

In replying to your second inquiry, your attention is directed to Act No. 518, House Bill No. 494, approved September 21, 1939, General Acts of Alabama, 1939, page 807, which, as pertinent, is as follows:

"Section 1. That the first \$400,000.00 of any surplus over and above \$750,000.00 in the State Treasury to the credit of the General Fund, after providing for the payment of all appropriations now or hereafter made payable from said fund, for each of the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, is hereby appropriated and shall be transferred permanently to a retirement fund for teachers in the State supported schools. * * *"

It is a well settled general rule of statutory construction that where the language of a statute is plain and unambiguous, the law makers should be intended to mean what they have plainly expressed, and consequently no room is left for construction

State Docks Commission v. State, 227 Ala. 414, 150 So. 345;

Ex Parte Allgood, 213 Ala. 426, 104 So. 851; *State ex rel. v. McGough*, 118 Ala. 166, 24 So. 395.

You will note that the above quoted Section 1 of Act 518, specifically prescribes that \$750 000.00 surplus should be computed only **after providing for the payment of all appropriations made payable from the General Fund** for the Fiscal Year ending September 30, 1940. The \$125,000.00 appropriation in question has been released by the Governor and has therefore been made absolute and payable from the General Fund for the Fiscal Year ending September 30, 1940. The language of Section 1 of Act 518, *supra*, should be given the meaning therein plainly expressed, and, therefore, it is my opinion that the sum of \$125,000.00, appropriated for the Department of Corrections and Institutions for the purpose of erecting a prison for women at Wetumpka, should not be included in the surplus to be estimated at the close of the Fiscal Year ending September 30, 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 25, 1940.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

Counties—Courts of County Commissioners—Schools—

Court of County Commissioners authorized to appropriate money from the general funds of the county for the benefit of schools of the county.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 20, 1940, in which you request my official opinion as follows:

"By two acts of the legislature, approved on August 31, 1939, appearing on pages 466 and 467 of the 1939 General Acts, it was provided that the tax collector and tax assessor of each county in the State should receive 2% commissions on all special county or district taxes levied for school purposes. These acts were amendments to Section 22 and Section 161 of the 1935 General Revenue Act approved July 10, 1935.

"It was not intended by the legislature that the tax assessor and tax collector of Jefferson County should receive commissions of 2% on the special county or district taxes levied for school purposes, and such commissions were not provided for in the sections of the General Revenue Act of 1935 which were amended.

"The County Board of Education of Jefferson County has filed a petition with the governing body of said county in which they are asking for an appropriation to the public schools in an amount which will approximate the amount of the commissions provided for the tax assessor and tax collector under the amendatory acts heretofore referred to. The county is desirous of making this appropriation. I would appreciate your opinion at the earliest possible date as to whether or not the governing body of Jefferson County is authorized under the law to make appropriations from its general fund to the public schools of Jefferson County.

"For your information a copy of the claim which has been filed with the County by the County Board of Education is hereto attached. If for any reason the form of the claim should be defective, this could be cured, as it is the desire of the County Commission to make an appropriation to the public schools in the approximate amount of said claim."

I call your attention to Act No. 602, H. 751, approved August 4, 1931, (General Acts, 1931, p. 687), which reads in pertinent part as follows:

"Section 1. The Courts of County Commissioners or Boards of Revenue of the several Counties of Alabama are hereby authorized at any meeting of said Court in any Calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the County Treasury for the support of the Public Schools within said County."

This office has heretofore ruled that the county governing body may make donations to public schools under the General Act of 1931, p. 687—Biennial Report of Attorney General 1934-36, p. 616; Quarterly Report of Attorney General, Vol. XVIII, p. 301.

In an opinion addressed to Hon. Walter P. Gewin, Member, House of Representatives, Hale County, dated March 7, 1940, attention was called to the fact that the general fund of the county must be operated within its income, (Act No. 379, H. 191, approved September 9, 1935, General Acts 1935, p. 803, generally known as the "County Finance Control Act"), and that an appropriation from the General Fund of the County for the purpose set out may not be made unless there is a surplus in such Fund. **Rhodes vs. Marengo County Bank**, 205 Ala. 667, 88 So. 850.

The premises considered, it is my opinion that the county governing body of Jefferson County may make an appropriation from the General Fund of the County for the purpose set out in your request, provided there is a surplus in such fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 25, 1940.

Hon. G. H. Boyd,
Register, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Trial Tax—Circuit Clerks—Registers in Chancery—

Commissions on collection of trial tax remitted to State and county by clerk and register in counties where said clerk and register are compensated on salary basis under constitutional authority held not authorized.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of August 23, 1940, in which you request my opinion as follows:

"In Re: 5% Commission on Trial Tax.

"I will appreciate an official opinion on the following:

"House Bill No. 324, at page 263, Section 9, General Revenue Act, approved July 10, copy of same attached hereto, imposes a \$3.00 Trial Tax on all cases then pending and thereafter docketed. The Act also provides among other things as follows:

"In all counties in this state where the Clerk or Register is paid on salary basis under constitutional authority the 5% commission provided for by this Act shall not be collected . . ."

"Therefore, in this county according to this particular Act the Trial Tax should be divided 50% to the State and 50% to Jefferson County.

"Act No. 577, S. 291, approved July 28, 1931, General Acts, page 669:

"This Act, a copy of which is attached hereto, provides for the Register or Clerks of the several counties to receive 5% commission on any sum or sums collected by the Clerks or Registers for the State of Alabama.

"I would appreciate an official opinion as to whether or not the Register of this particular county should deduct 5% commission from the proportions of Trial Tax remitted to the State of Alabama, and of course, the 5% so deducted would be remitted to the County Treasury, inasmuch as the Register of this County is on a salary basis and not fee basis.

"House Bill No. 324 is clearly understood by the writer, and I am interested only in an opinion as to whether or not 5% commission should be deducted from the Trial Tax remitted to the State of Alabama."

In reply, I wish to advise you that in my opinion you, as Register in Chancery of Jefferson County, should not retain five percent commission on trial tax collected and remitted to the State of Alabama.

I wish to refer you to Act No. 577, S. 291, approved July 28, 1931 (General Acts, 1931, page 669), Section 1 of which provides as follows:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

You will note that this act provides five percent commission to clerks and registers for collecting and remitting money to the State generally. However, commission for collecting and remitting trial tax was governed by a specific provision found in Act No. 491, H. 528, approved July 22, 1931 (General Acts, 1931, page 604) until the effective date of the 1935 Revenue Act, viz: October 1, 1935.

Section 1 of the last above named act of 1931 provides as follows:

"Section 1. That a trial tax of Three Dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: one-half thereof into the general funds of the State Treasury, and the other half into the general funds of the County in which the same is collected and for collecting and remitting such tax, the clerk or register may retain 5% commission thereof."

In my opinion, this is a specific provision of law controlling a general provision and must necessarily control, in part, the answer to your question. Special provisions relating to specific subjects control general provisions relating to specific subjects control general provisions relating to general subjects, and things especially treated should be considered as exceptions to general provisions. **Herren v. Griffin**, 211 Ala. 225, 100 So. 202. See also Alabama Digest, Statutes, Key No. 225½.

I wish to further refer you to the provisions of Section 9 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), which is the Revenue Act of 1935, to which you refer in your request and which provides, in part, as follows:

"In all counties in this state where the clerk or register is paid on a salary basis, under constitutional authority, the five percent (5%) commission provided for by this act shall not be collected, but such clerk or register shall pay to the state and county, respectively, each one-half of such trial tax. * * *"

It is my opinion that the above quoted provision of the 1935 Revenue Act is a pro tanto amendment of the General Acts of 1931, page 604, quoted

supra, and forecloses the question of whether or not clerks and registers in counties in this state who are paid on a salary basis shall collect the five percent commission provided therein.

You will note that a specific provision states that "the five percent commission provided for by this act shall not be collected, but such clerk or register shall pay to the state and county, respectively, each one-half of such trial tax."

It is therefore my opinion that you, as Register, are not authorized now to deduct five percent commission on trial tax remitted to the State.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 25, 1940.

Hon. Frank Pearce,
Tax Assessor,
Marion County,
Hamilton, Alabama.

Licenses—Exemptions—Veterans—

World War Veteran operating a motion picture show with assistance of his wife without other help or employees, entitled to the exemption as to privilege or business licenses declared under Act No. 494, S. 348, approved September 13, 1935 (General Acts, 1935, page 1057); provided such veteran is not precluded by the other provisions of said act from claiming such exemption.

Wife in such instance deemed to be a helper, as defined by Act, whether or not receiving compensation for her services.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of September 12, 1940, in which you request my opinion as follows:

"Please advise me if a Worlds War Veteran who has a twenty five per cent disability and operates a motion picture show in which his wife is the ticket seller and he takes up the tickets at the door is entitled to receive the exemption on the privilege license?"

Act No. 494, S. 348, approved September 13, 1935 (General Acts, 1935, page 1057), commonly known as the Veterans License Exemptions Act, provides in

Section 1: "That every bona fide permanent resident of the State of Alabama who served as an officer or enlisted man in the United States Army, Navy or Marine Corps during the World War between April 6, 1917 and November 11, 1918 * * * and who, at the time of his application for license, as hereinafter provided for shall be physically disabled to the extent of twenty-five per cent or more, shall, upon sufficient identification and upon sufficient proof of such disability and upon sufficient proof of being a permanent resident in this State, and upon the production of an honorable discharge from the service of the United States Army, Navy, or Marine Corps during the World War * * * within the respective limits of time hereinabove prescribed * * * be exempt from business or occupational license taxes to the extent, and subject to the conditions hereinafter specified. * * *

Section 14 of the said Act provides as follows:

"Section 14. Any veteran whose property both real and personal is valued at Five Thousand (\$5,000.00) Dollars or more shall be precluded from the exemptions granted herein; nor shall a veteran whose net annual income is Twelve Hundred Dollars (\$1,200.00) or more be entitled to the exemption herein granted."

Section 2 of the said Act provides as follows:

"Section 2. That each such veteran who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business of occupation a license tax is prescribed by the State of Alabama, shall be entitled to a license from the State to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less, all, or such portion of, such license tax as shall not exceed Twenty five Dollars (\$25.00); provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

Section 3 and Section 4 of the said Act are identical to Section 2 except that they allow \$25.00 exemptions from county and municipal license. Section 5 of said Act provides as follows:

"Section 5. Any person who assists or serves such veteran in the conduct, or carrying on, of such veteran's business or occupation shall be deemed an employee, helper or apprentice, whether such assisting person be paid any compensation for his assistance or service or not. The term 'License tax', as used in this Act, shall be deemed to include any tax prescribed by a license tax schedule, but not to exclude any license tax otherwise prescribed."

If the World War Veteran referred to in your inquiry comes within the requirements of Section 1 of said Act and is not disqualified from receiving the exemptions by Section 14 of said Act, and has not received his Veteran's exemption on some other business or occupation as prohibited by Sections 2, 3 and 4 of the said Act, then he is entitled to the exemptions set out by the said Act provided no person other than his wife assists or aids him in his picture show business. In view of Section 5 of the said Act, supra, the

Veteran's wife must be construed to be an employee, helper or apprentice. Therefore, if someone else assists the Veteran and his wife in the operation of the picture show he would have more than one employee, helper or apprentice and would not be entitled to the exemptions expressed in the said Act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 25, 1940.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Refunds—Filing Tax—

Whenever a paper is presented to the judge of probate for record, it is not his duty to pass on whether or not the paper should be recorded. This is the duty of the party offering it, and when filed and recorded the proper filing tax and fee attach. The party offering said paper for record is not entitled to a refund of the recording fee and tax although the recording of same was unnecessary.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 6, 1940, in which you request my official opinion as follows:

"On July 11, 1940 Bill No. 642 S. 292-Calhoun amending Code Section 6898 was approved by the Governor. This bill provides for security to the seller of certain household and kitchen furniture and appliances in amounts of less than \$200.00 without recordation or the mortgage or sale contract.

"On August 14 I received a copy of this New Bill referred to above. I immediately notified as many of those people in Tuscaloosa who would be beneficiaries under this bill, however, during the period of time from July 11, 1940, to August 14, 1940 when I first knew that a bill had been passed the C. W. Lewis Furniture Company had filed several lease sale contracts in this office in amounts less than \$200.00. These contracts had been accepted by me, marked filed, indexed and recorded. Since the C. W. Lewis Furniture Company have been informed of the approval of this bill on July 11, 1940 they have requested that I refund to them the amounts paid by them to me as recording fee and tax on these instruments which were filed by them since July 11, 1940, voluntarily, as they had always done prior to the passage of this bill.

"Please advise me if I can legally make a refund of the amounts paid me by this company, also if they can secure a refund of that portion of the tax which had already been remitted by me to the State of Alabama."

My answer to your inquiries is in the negative.

I call your attention to the pertinent part of Act No. 642, S. 292, approved July 11, 1940, which provides:

"* * ; but where such contracts are for less than two hundred dollars in amount and also run for two years or less, and relate exclusively to household or kitchen furniture, goods, appliances, or equipment, so long as such personal property remains in the county in which the vendor or lessor resides or has an established place of business, they need not be filed for record as provided in this section". (Emphasis supplied)

It will be noted that such contracts need not be filed for record. However, the vendor or lessor retaining the title to the property may desire to file the contract for record, and in this case, it is not incumbent on the judge of probate to inquire into these matters.

This office has heretofore ruled that whenever a paper is presented to the judge of probate for record it is not his duty to pass on whether or not the paper should be recorded. This is the duty of the party offering it for record, and when the judge of probate does file and record the same, he is entitled to payment for such services at the regular price. Quarterly Report of the Attorney General, Vol. I, P. 151.

You state in your inquiry that the recording tax and fee were paid voluntarily by the party offering the written instrument for record. This clearly indicates that the party did not pay the recording tax and fee through error. The Supreme Court of Alabama, in the case of *Singer Sewing Machine Co. vs. Teasley*, 198 Ala. 673, 73 So. 969, in denying the right of a party to a refund of a license, held:

"The applicant for a license required of certain occupations is presumed to know his own business and the tax money voluntarily paid by him with knowledge of all the facts cannot be recovered."

This case seems to be analogous to the facts set out in your inquiry, and it is my opinion that when a party offers for record a conditional sales contract or lease sale contract and said instrument is duly recorded, the party offering the same is not entitled to a refund of any amounts paid to the judge of probate.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 26, 1940.

Dr. G. W. Blakey,
Vice-President, Member
Board of Optometry,
Dothan, Alabama

Sales Tax—Optometrists—Oculists—Opticians—

1. Optometrists and oculists are not liable for the two per cent tax on retail sales with respect to receipts from professional services rendered.

2. Optometrists and oculists are liable for the two per cent tax on retail sales for the manufacture or sale of eye glasses, spectacles and lenses, and may not deduct any sum or amount for material and/or labor or services rendered in the manufacture thereof.

3. Bill rendered to customer need not be itemized; but records kept by optometrists should show amount charged for professional services and materials respectively, and the amount of sales tax collected.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for opinion dated June 29, 1940 follows:

“RE: Optometrists’ Association.

“As a member of the Alabama State Board of Optometry and as Vice-President of said Board, I would like an opinion answering the following questions:

“(1) Is an optometrist liable for sales tax for glasses sold by him on the entire sales price of the glasses where the optometrist examines the patient, prescribes the glasses, fills the prescription himself and gives professional advice as to the wearing of the glasses, manufactures of processes the glasses, and sells them for a stipulated price?

“(2) Is an optometrist liable for sales tax on the entire sales price of a pair of glasses which he sells and charges the customer separately for professional services and material, merchandise and labor, all of which went into the processing or manufacturing of said glasses?

“(3) If an optometrist keeps a record of his professional services and the amount charged to each customer for said professional services and a different record of merchandise and material sold even though they be in the same pair of glasses and to the same customer, would the optometrist be liable for sales tax on the gross amount of the sale of the glasses, or would he only be liable for sales tax on that part after deducting a reasonable charge for his professional services?

"(4) Is it necessary that the optometrist bill the patient buying a pair of glasses from an optometrist with a bill showing separately that charged for professional services and that charged for merchandise and material?

"(5) Does the State Department of Revenue of Alabama or the Commissioner of Revenue have authority in law to require an optometrist to bill a patient buying glasses from an optometrist with a bill showing separately the amount charged for professional services and the amount charged for material and merchandise where the patient purchases a pair of glasses in which the optometrist charges for professional services and merchandise and material.

"(6) If the Alabama State Department of Revenue or the Commissioner of Revenue has such a rule or regulation requiring an optometrist to bill a patient, whether he pays cash or not for glasses, is not such rule and regulation unreasonable and senseless and is not the making of such a rule or regulation by said Department or said Commissioner beyond their power?

All of the questions contained in your request are so inter-related that I will not attempt a categorical answer to your questions, but will confine this opinion to a general discussion of the liability of optometrists and oculists for the two per cent sales tax imposed by Act No. 18, H. 92, approved February 8, 1939, General Acts, 1939, page 16.

The Supreme Court of this state, in the case of **State Tax Commission v. Hopkins**, 234 Ala. 556, 176 So. 210, held that the 1936-1937 Sales Tax Act could not be extended so as to tax one's income from personal skill in the exercise of a profession. This case is equally applicable to Act No. 18, supra, as the provisions of the 1936-1937 Sales Tax Act in this regard are no different from the provisions of Act No. 18, supra.

The professional services referred to in the Hopkins case, supra, are services rendered by optometrists and oculists in the examination and refraction of the eyes and ocular care and treatment. For these services, it is clear from the Hopkins case that no sales tax can or may legally be extracted.

The question now presents itself as to whether or not an optometrist or oculist may deduct any sum or amount for material, labor or service costs after the actual manufacture of the glasses or spectacles is begun.

This question has been answered in the negative in the Hopkins case, wherein it was said:

"In the agreed statement of facts, it is shown that the value of the material employed in the manufacture of glasses for and fitting the same to the customer is 20 per cent of the total price charged for the manufacture and service when the glasses are completed and delivered. The test as to the application and validity of the tax in such cases is not the relative value of the material and service, but the nature and character of the process, activities, or manufacture required or employed. That the matter is severable, as indicated by the agreed case, does not change the fact or process of manufacture and sale of a tan-

gible personal property made the subject of appropriate provisions of the statute. *Lone Star Cement Co. et al. v. State Tax Commission et al.*, supra."

You are, therefore, advised that after the actual manufacture of the glasses is begun, an optometrist or oculist may not deduct any sum or amount for services rendered or for material used in the glasses.

What I have said hereinabove is not to be construed to mean that an optometrist or oculist is liable for any sales tax on the professional services rendered before the actual manufacture of the glasses is begun. That is to say, the examination of a person's eyes to determine what type of glasses or spectacles is needed by that person, is a professional service, and the income therefrom is not subject to the sales tax.

The further question presents itself as to whether or not an optometrist or oculist who has examined a person's eyes to determine whether or not such person needs glasses, and after such examination, manufactures and fits glasses to that person's eyes, should bill such person with a lump sum bill or a bill itemizing the professional services rendered and the services for manufacturing and fitting the glasses.

It is true that in the Hopkins case the decree of the lower court was to the effect that an itemization of services, labor and materials was not necessary, and that the optometrist could deduct twenty per cent for services and material which went into the manufacture of the glasses. It is also true that the Hopkins case was reversed by the Supreme Court. However, it is my opinion that the itemization considered in the Hopkins case had reference to the records kept by the optometrist, and not to the bill rendered to his client. I do not see how it could be said that the form in which an optometrist renders his bill to a client could have anything to do with whether or not the article of tangible personal property sold was liable for the sales tax. Whether or not a sale of tangible personal property is subject to sales tax is a matter to be determined by the facts in each case, and not by the form in which the bill is rendered. You are, therefore, advised that in my opinion an optometrist may render a lump sum bill to a client and need not itemize such bill. However, such optometrist would not be authorized to collect sales tax on such lump sum bill, but only on that amount charged after the actual manufacture of the glasses was begun, as reflected by the records kept by such optometrist, as required by Section IX of Act No. 18, supra.

You are further advised that if an optometrist keeps the records required by Section IX of Act No. 18, supra, then such optometrist has done all that is required of him under said Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 26, 1940.

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

State Merit System Act — Mobile County Civil Service Act—

1. Chief Clerk employed by Solicitor of Mobile County held not subject to State Merit System Act, but subject to Mobile County Civil Service Act.

2. Assistant Solicitor appointed by Circuit Solicitor of Mobile County held not to be under State Merit System Act, and held to be in "Unclassified Service" of Mobile County Civil Service Act.

3. Employees of Circuit Clerk held not within State Merit System Act, but subject to Mobile County Civil Service Act, except as herein limited.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your request for an official opinion of September 16, 1940, which is as follows:

"I received this morning your favor of the 13th instant which was in answer to my favor of September 10th.

"In my letter of the 10th instant, I inquired as to whether or not the State Personnel Board had the authority to refund to me the amount which I paid from my own funds to secure additional help in the performance of my official duties and further, whether or not such Board had the authority to give me additional help as needed.

"In the second paragraph of your letter, you state as follows:

"You are advised that I find no authority for the Personnel Board to provide either the refund or additional help, for the reason that the Legislature appropriated no moneys to the Board for the payment of salaries of persons employed otherwise than in the administration of the Merit System Act itself. Moreover I do not believe that it was the intent of the legislature to include the circuit solicitor's office within the Merit System Act. You will note the particular provision of Section 10 of the Merit System Act No. 58 S. 144, approved March 2, 1939 (General Acts, 1939, p. 68) which section defines those positions in the exempt service of the State as follows:

"(1) Officers elected by vote of the people (this will include your office of circuit solicitor) * * * (3) Officers, attendants and

employees of the Circuit Courts, Clerks of County Jury Boards, and deputy Circuit Solicitors.'

"You conclude your letter by stating that in view of the foregoing, you must advise me that there is no authority for the State Personnel Board to supply me with the personnel which I state is needed. You also state that your opinion is not an official opinion.

"I would appreciate it if you would give me an official opinion as soon as you reasonably can as to whether or not my Secretary, who is my stenographer, filing clerk and general office assistant, comes under the influence of the State Merit System Act, which is referred to hereinabove. Under an Act of the Legislature, I appoint my said Secretary and the Legislature fixes his salary at \$125.00 per month. He is paid by the County and, as stated, appointed by me, a State officer. I have one Assistant Solicitor, who is paid by the County. My understanding is that he does not come within the influence of this said Act. I would appreciate it if you would advise me whether or not I am correct with reference to these two employees or assistants, that is, whether or not they are included in the above Act.

"I would also like for you to advise me whether or not they are included in the Merit System Act for Mobile County, which Act was passed by the recent Legislature.

"I will ask your further opinion on the further question with reference to statements contained in paragraph three of your said letter, at the top of page two. You state that Section 10 of the Merit System Act No. 58 S. 144, approved March 2, 1939 (General Acts, 1939, p. 68), which is known as the State Merit System Act, exempts 'Officers elected by vote of the people, officers, attendants and employees of the Circuit Court, Clerks of the County Jury Boards and Deputy Circuit Solicitors'. In your opinion, are the Deputy Clerks and employees of the Circuit Court Clerk's office exempt from the State Merit System Act and also from the County Merit System Act. The Circuit Court Clerk of this County is elected by the people, of course, and he appoints his Deputies and other assistants in his office. I take it, from the tenor of your said letter, that the "attendants and employees of the Circuit Court' are exempt from the influence of the State Act. By attendants and employees of the Circuit Court, I take it that you mean the Deputy Clerks of the Circuit Court and other assistants in the Circuit Court Clerk's office, as well as the Court bailiffs. All of these are paid out of the County Treasury. I would like to know whether or not, in your opinion, they are exempt from the operation of the County Merit System Act.

"You know, of course, that we have the State Merit System Act and the County Merit System Act and what I am anxious to know is whether or not my Deputy or Assistant Solicitor and my Secretary, both of whom are paid by the County and whether or not the assistants to the Circuit Court Clerk, that is, his two Deputy Clerks, stenographers and typists, come within the influence of either of said Acts."

Answering your inquiries seriatim, you are advised first, that your secretary would not come within the influence of the State Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, page 68). I

presume that the secretary to whom you refer is the "Chief Clerk" appointed by you under Act No. 345, H. 845, approved September 6, 1935, Local Acts, 1935, page 209, as amended by Act No. 266, H. 595, approved August 25, 1939, page 155, 156. Under these acts, the Chief Clerk of the Solicitor, appointed by him, is paid out of the general funds of the County Treasury of Mobile County. The State Merit System Act, supra, is applicable only to those officers and positions in the "State Service" (see Section 10). By Subsection 11 of Section 3 of the State Merit System Act, supra, it is provided that "State Service" shall not include offices and positions of trust or employment of the local governmental subdivisions" of the State.

It is apparent from the local acts hereinabove cited that your Chief Clerk is an employee of the county rather than of the State.

It is further my judgment that your Chief Clerk would come within the "Classified Service", as defined by the Mobile County Civil Service Act (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, page 298). In this regard your attention is called to Section 1 of that act wherein the "Classified Service" is defined as including "all offices, positions and employment in Mobile County * * * the holders of which are paid, whether by salaries, wages or fees, in whole or in part, from funds of Mobile County * * *."

With respect to the Assistant Solicitor, you are advised that, inasmuch as he is appointed by you under Act No. 260, H. 460, approved August 23, 1939, General Acts, 1939, page 423, is paid out of the general funds of the County Treasury of Mobile County (Section 2 of Act No. 260, supra), and his duties are confined to the county, he is not in the "State Service" and is therefore not subject to the State Merit System Act (cf. Ex parte Wiley, 54 Ala. 226). In my opinion, your Assistant Solicitor does not come within the Classified Service of the Mobile Act because of the provisions of Subsection 2 of Section 2 of the Mobile County Civil Service Act, which provides that "Where by present law official duties of any officer mentioned in Subdivision 1 of this section are or may be performed by a chief assistant appointed by him, such chief assistant" shall be in the Unclassified Service. Since, under Section 1 of Local Act No. 260, supra, the Assistant Solicitor appointed by you may act for you when requested so to do, it would appear that he would come within the "Unclassified Service", as defined by Section 2 of the Mobile County Civil Service Act. See also Subsection 8 of Section 2 placing "attorneys * * * employed in their professional capacity" in the "Unclassified Service."

The Clerk of the Circuit Court, as you know, is a constitutional county officer. See Constitution of 1901, Section 165. Cf. *Osborn v. Henry*, 200 Ala. 353, 76 So. 119. It is therefore apparent that the State Merit System Act would not be applicable to such Clerk or to his deputies or employees.

Answering your inquiry regarding the Deputy Clerk in the Circuit Clerk's office, I am enclosing herewith copy of an opinion rendered under date of September 3, 1940, to Hon. Wm. A. Conrad, Clerk of the Circuit Court, Mobile County, Alabama, in which it was held that the Deputy Clerk of the Circuit Court of Mobile County, appointed to serve as Clerk of the Criminal Division of the Circuit Court, comes within the "Unclassified Service", as defined by the Mobile County Civil Service Act.

With respect to the applicability of the Mobile County Civil Service Act to the employees of the Clerk, other than his deputies, I call your attention again to the provisions of that act defining "Classified Service", supra. You will readily see from this provision that such employees would come within the provisions of the Mobile County Civil Service Act. Cf. Opinion to Hon. L. D. Dixon, President, Mobile County Jury Commission, rendered under date of July 22, 1940, copy of which is herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1940.

Hon. Ben M. Smith,
Brigadier General,
The Adjutant General,
Capitol.

Alabama Air Service Building Commission — Transfer of Functions — Appropriation —

1. Functions relating to air arm of Alabama National Guard imposed on Alabama Air Service Building Commission by Act No. 347 H. 753, approved July 2, 1931 (Gen. Acts, 1931, p. 402) as amended, were transferred to the Armory Commission of Alabama by Act No. 276 S. 362, approved August 23, 1935 (Gen. Acts, 1935, p. 672), as amended by Act No. 508, H. 772, approved September 21, 1939 (Gen. Acts, 1939, p. 772).

2. Appropriation made to Alabama Air Service Building Commission by the General Appropriations Act of 1939 may be expended by Armory Commission of Alabama, the agency to which its functions have been transferred.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion of September 9, 1940 as follows:

"In connection with the questions asked below, your attention is called to the following Acts of Legislature; (1) Act No. 347, approved July 2, 1931, (page 402 Acts of 1931), creating the Alabama Air Service Building Commission for the purpose of building facilities for the Alabama National Guard Air Corps unit at Birmingham, Alabama; (2) Act No. 294, approved November 9, 1932, (page 298, Acts of 1932), amending the above 1931 Act; (3) Section 1, X31, 3, of Act 247, approved August 24, 1939, (page 418, Acts of 1939), making an annual appropriation for the above mentioned commission; (4) Act No. 276, approved August 23,

1935, (page 672, Acts of 1935, creating the Armory Commission of Alabama; and Act No. 508, approved September 21, 1939, (page 772, Acts of 1939) amending said Act of 1935.

"Your opinion is requested in answer to the following questions as to the authority of the Armory Commission of Alabama and as to the availability to the Armory Commission of Alabama of appropriations heretofore made for the Alabama Air Service Building Commission; (a) Does the above mentioned Act of 1935, as amended by the Act of September 21, 1939, transfer to the Armory Commission of Alabama, the functions of the Alabama Air Service Building Commission? If so, what is the present status of the Alabama Air Service Building Commission? (b) Are the appropriations heretofore made for the Alabama Air Service Building Commission available to the Armory Commission of Alabama and subject to its control in making out its duties under said Act of 1935 as amended by said Act of 1939 (particular reference being had to Sections 5, 6 and 7 of said Armory Commission Act as amended in 1939).

"The above legal questions arise in connection with the desires of the Armory Commission of Alabama to construct additional hangers and other facilities for the Alabama National Guard Air Corps unit at Birmingham, Alabama and to expend in that connection the appropriation made for the Alabama Air Service Building Commission in the General Appropriation Act approved August 24, 1939. The State Director of Finance has asked that your opinion be obtained as to the legal authority of the Armory Commission of Alabama in this connection and its authority to use said appropriation for that purpose.

"Your early attention to this matter will be very much appreciated as the progress of this construction project is dependent upon the early release of the funds in question, which must be released before the end of this fiscal years."

In my opinion your question lettered (a) must be answered in the affirmative.

The Alabama Air Service Building Commission was created by Act No. 347 H. 758, approved July 2, 1931 (Gen. Acts 1931, p. 402). At that time there was no state agency which was charged with the duty of providing armories, buildings, training areas, etc. for all of the units of the National Guard of Alabama and the 1931 Act, supra, merely purported to create a commission for the purpose of providing such facilities for the air arm of the National Guard of Alabama.

By 1935, the Legislature enacted Act No. 276 S. 362, approved August 23, 1935 (Gen. Act, 1935, page 672), by which there was created an Armory Commission for the State of Alabama, upon which was imposed the duty of providing armories, buildings, training areas and other facilities of all of the organizations and subdivisions of the National Guard of Alabama and other naval militia. Section 6 thereof provides:

"Section 6. PROVIDING ARMORIES AND GROUNDS FOR TRAINING PURPOSES: The Armory Commission shall provide adequate armories, buildings, grounds, and other training facilities for the

National Guard and Naval Militia of Alabama, for the purpose of drill, instruction and administration, and for the safekeeping of public property of the State of Alabama and the United States, issued to or for the use of the Alabama National Guard and Naval Militia, including animals, and for such purpose shall be charged with the administration and expenditure of the Armory Fund. All expenditures from said fund authorized by the Commission shall be made upon vouchers authenticated by the Adjutant General and approved by the Governor."

By Section 21 thereof, it is provided:

"Section 21. All laws, or parts of laws, inconsistent, or in conflict with the provisions of this Act, are hereby repealed."

By Act No. 508 H. 772, approved September 21, 1939 (Gen. Acts 1939, p. 772) the Legislature amended the Armory Commission Act of 1935, *supra*, Section 3 of said act, which amends Section 6 of the 1935 act, quoted *supra*, provides:

"Section 6. **Providing Armories, Grounds, and Other Facilities:** The Armory Commission of Alabama shall provide adequate armories, buildings, equipment, furniture, target ranges, and other necessary facilities for the proper housing, instruction, training and administration of all units and headquarters of the National Guard and Naval Militia of Alabama; shall provide for the State Military Department like facilities needed for the proper protection, care, maintenance, repair, issue, and upkeep of public property of the State of Alabama and of the United States issued to or for the use of the National Guard or Naval Militia of Alabama, and for the proper and efficient administration of the Alabama National Guard and Naval Militia; and shall provide for the maintenance, upkeep, repair, and improvement of such facilities."

Section 4 of said act provides:

"Section 4. Any law or part of any law enacted prior to the date of the approval of this Act which is inconsistent with any of the provisions of this Act is hereby expressly repealed."

In my judgment, a study of all of the acts cited and quoted from, *supra*, leads to the conclusion that it was the legislative intent to invest the Armory Commission of Alabama with all of the duties of the Alabama Air Service Building Commission theretofore created by the 1931 act, *supra*. The Armory Commission of Alabama is now vested with the duties which were delegated to the Alabama Air Service Building Commission by the 1931 Act, *supra*. Unless the several acts be so construed that the duties heretofore imposed upon the Alabama Air Service Building Commission are now transferred to the Armory Commission of Alabama, we have the anomalous situation obtaining that the same duties and functions are imposed upon two separate agencies, without any division or allocation or separation as between them. In my opinion, the Legislature did not intend that any such confused state should exist. I think that the Legislature intent is clear that the duties heretofore imposed upon the Alabama Air Service Building Commission have been transferred to and imposed upon the Armory Commission of Alabama.

In view of the 1935 and 1939 Armory Commission Acts, cited supra, it is my opinion that the Alabama Air Service Building Commission, as an agency of the State, is functus officio.

The General Appropriation Act of 1939, Act No. 247, So. 239, approved August 24, 1939 (Gen. Acts, 1939, p. 411), in so far as here pertinent, provides:

"Section 1. That there is hereby appropriated for the ordinary expenses of the Executive and Judicial Departments of the State, for the interest on the public debt, and for the public schools for each of the four fiscal years ending respectively September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, to be paid out of any monies in the State Treasury not otherwise appropriated, the several sums of money hereinafter specified or so much thereof as may be necessary: * * * XIII. MISCELLANEOUS: * * * 3. Alabama Air Service Building Commission: For matching Federal funds conditional upon the approval of the Governor, \$20,000.00."

In is apparent that the Legislature intended to appropriate the sum of \$20,000.00 for the purposes which had heretofore been entrusted to the Alabama Air Service Building Commission; and that the Legislature, through inadvertence, made the appropriation to the agency to which the functions had theretofore been entrusted and not to the Armory Commission of Alabama, the agency which is now entrusted with the performance of such functions. In my opinion, the Armory Commission of Alabama has full power and authority to receive said appropriation from the proper disbursing officers of the State, and full power to expend the same for the purposes prescribed by law, that is to say the upbuilding of the air arm of the National Guard of Alabama.

Cf. Quarterly Reports, Attorney General, Vol. XIII, p. 88, and Vol. XVIII, page 208.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 27, 1940.

Dr. Walter B. Jones,
Director of Conservation,
Department of Conservation,
Capitol.

Section 4 of Act No. 626, H. 686 approved July 2, 1940 construed.

1. Original vendee of any item or items enumerated in Section 4, supra, required to keep record provided in said section.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of September 14, 1940 follows:

"Re: Request for Opinion as to Application of Section 4 of an Act approved July 2, 1940 (No. 626 - H. 686 - Scott).

"Section 4 of the above Act states in part as follows:

"Any person, firm or corporation buying, contracting to buy, or otherwise acquiring logs, poles, piling, cross ties, pulpwood, veneer bolts, stave bolts, or other unmanufactured or semimanufactured forest products shall keep a written record in this State of every such purchase. Said record shall contain the names of the person or persons from whom such property was acquired, the amount thereof, the date of delivery, and the section, township and range from which such timber or other forest products were severed, which information shall be obtained from the person or persons from whom such property was acquired. This record must be a true, accurate, and correct statement of the transaction as provided for in this Section and any person who knowingly gives false information to the purchaser of such property or wilfully mistakes the facts with intent to defraud shall be guilty of a misdemeanor,' etc.

"We have received inquiries from a certain railroad company advising that it acquires crossties from certain lumber companies for use in railroad construction. This railroad company is dependent upon such information as it receives from the vendor of the ties as to the place where the same were severed and the person from whom they were originally purchased. Inasmuch as the original vendee of the ties maintains such record, is it necessary that any subsequent vendee maintain a similar record, as contemplated by the above Act?"

It is my opinion that only the original vendee of the items enumerated in Section 4 of Act No. 626, H. 686, approved July 2, 1940, are required to keep the record provided for in said section. It will be noted from a careful reading of Section 4, *supra*, that not only is there uncertainty as to the meaning of the language employed with reference to the question propounded by you, but the further fact is present that if a literal interpretation is given the words used, it will lead, as hereinafter pointed out, to unreasonable, unjust or absurd consequences. The occasion is therefore presented for construing Section 4, *supra*, in an effort to arrive at the legislative intent. *Abramson v. Hard*, 229 Ala. 2, 155 So. 633.

If a literal interpretation is given the words employed in Section 4, *supra*, it would require a vendee of any item or items enumerated in said section to keep the required record even though his purchase was subsequent to the original purchase involving such item or items; thus leading to the absurd and unreasonable consequence of requiring each vendee, purchasing any item or items enumerated in said section subsequent to the original purchase of the same, to keep a copy or duplicate of the record kept by the original vendee as the subsequent vendee would have only the information supplied him by the original vendee for his record.

Manifestly the intention of the Legislature in requiring each "person, firm or corporation buying, contracting to buy, or otherwise acquiring logs, poles, piling, cross ties, pulp wood, veneer bolts, stave bolts, or other manufactured or semi-manufactured forest products" to keep the record required by Section 4, supra, was for the sole purpose of making available, to the proper officials, information which would prove invaluable in checking on suspected violators of Act No. 626, supra, and also in the prosecution of violators under the provisions of said act. Certainly, however, the Legislature realized that any of the items enumerated in Section 4, supra, are capable of resale and, therefore, any vendee purchasing said items subsequent to the original sale and purchase of the same would not be in a position to acquire information for the purpose of keeping a record other than that made available by the original vendee. This being true, it is my opinion that it was the intention of the Legislature that only the original vendee of the items enumerated in Section 4, supra, be required to keep the record therein provided for, as duplicates of such records would not prove to be of any great value.

Answering your specific question, it is my opinion that the railroad company in question would not be required by Section 4, supra, to keep a record of the cross ties purchased by it from certain lumber companies, provided the said railroad company was not the original vendee of the same.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 27, 1940.

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Privilege Licenses—Census—

Privilege licenses rated according to the population of a town, city or county will not be reclassified until some time during the year 1943, as provided by Act No. 233, S. 221, approved August 16, 1939 (General Acts, 1939, page 388).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 20, 1940, in which you request my opinion as follows:

"As you know, the privilege licenses issued by the Probate Offices are based on the population of the Cities and Towns, and the last Federal Census is used as the official population.

"We understand from preliminary figures released from the Census Department of this district that the 1940 Census which has just been completed gave Cullman a population of 5,030. The 1930 Census which we have been using since then gave Cullman a population of 2,788. Since the 1940 Census put Cullman past the 5,000 mark, it will make quite a few changes in our licenses.

"The question we wish to have your opinion on is this: When does the new population become effective under the new Census? Should we start issuing licenses based on a population of more than 5,000 on October 1 when we begin issuing licenses for next year, or should we wait until some later date when the population under the new Census is made official by proclamation?

"If it is at all possible for you to answer this before October 1, it will be highly appreciated, as we start issuing new licenses on that date and we want to know how to govern ourselves."

In my opinion, the new population will not become effective, insofar as the privilege licenses are concerned until some time during the year 1943.

Section 368 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), provides, as pertinent, that "In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States Census shall govern."

The 1939 Legislature enacted a statute particularly applicable to laws requiring classification based on the Federal Census. This act (Act No. 233, S. 221, approved August 16, 1939, General Acts, 1939, page 388) provides, as pertinent, as follows:

"Section 1. That the ninetieth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

In view of this statute, it appears that the reclassification date for determining the amount of license where rated according to the population of a town, city or county, will be on the ninetieth day after the first day of the next regular session of the Alabama Legislature to be held in 1943. Cf. Opinions to Hon. B. G. Robison, Judge of Probate, Pickens County, Alabama, rendered under date of July 12, 1940, and to Hon. H. Herbert Evans, Anniston, Alabama, rendered under date of August 10, 1940, copies of which are herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1940.

Hon. A. C. Allen, President,
Elmore County Board of Education,
Wetumpka, Alabama.

Schools—Demonstration Farms—

No authority to expend proceeds from sale of demonstration farms which is authorized by Act No. 559, H. 521, approved September 21, 1939 (General Acts, 1939, page 881) for (1) benefit of other schools in the county, (2) retirement of school warrants issued and sold for the purpose of constructing and equipping new buildings on said farm which new buildings were constructed and equipped prior to the effective date of Act No. 559, H. 521, approved September 21, 1939 (General Acts, 1939, page 881), (3) payment of expenses of operation of school located on demonstration farm lands.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 12, 1940, in which you request my opinion as follows:

"As President of the County Board of Education of Elmore County, Alabama, I would like to have your official opinion on the following:

"There is located at Wetumpka, Elmore County, Alabama, the Wetumpka High School which was formerly known as one of the State Secondary Agricultural Schools of Alabama and designated as such and is one of the schools referred to in Acts of the Legislature of 1939, page 881—Act No. 559. There was attached to said school certain land used as a school demonstration farm.

"Pursuant to the authority conferred by the Act referred to said school farm was sold and the net proceeds amounting to about \$13,000.00 are in process of payment and will be paid into the treasury of school funds of Elmore County and the Board of Education of this county now has the administrative control of the school referred to. Section 4 of this act provides that these funds shall be used by the Board in constructing and repairing buildings and for purchasing equipment for the school to which the farm was attached.

"During the scholastic year 1939-40 the Board of Education of Elmore County issued and sold approximately \$100,000.00 of capital Outlay Warrants pledging the county 3 mill tax for payment thereof and the proceeds thereof were used in the construction and the furnishing of a new high school building on the school lot occupied by the old State Secondary Agricultural School of the said County of Elmore at Wetumpka, Alabama.

"The question has arisen before the Board in view of the above circumstances as to the proper method of expending the said net proceeds

of the sale of the school farm. I would like to have your opinion on the following questions:

"1. Can the Board legally expend these net proceeds for the benefit of other schools in the county inasmuch as the Board has expended as aforesaid approximately \$10,000.00 in the construction and equipping of the new building at Wetumpka?

"2. Can the Board legally use the proceeds from the sale of said farm in the payment and retirement of school warrants issued and sold, the proceeds of which were used in constructing and equipping the new building at Wetumpka?

"3. By the time the current school year closes the Board will have expended more than the amount of the said net proceeds in paying expenses of operation of the said school at Wetumpka, and in view of this fact, can said net proceeds of the sale of the farm be said to take the place of these expenditures, thus operating to release this money to be used in paying expenses of the schools of the county?

"For your information in answering these questions, I mention the fact that the old building occupied by the State Secondary Agricultural School had become unfit for use and has been abandoned since the completion of the new building."

In reply, I wish to refer you to Section 4 of Act No. 559, H. 521, approved September 21, 1939 (General Acts, 1939, page 881), which provides as follows:

"Section 4. That the cost of effecting the sale of the said property of the State of Alabama at any of said demonstration farms shall be paid out of the moneys accruing from such sale. All outstanding obligations against any demonstration farm, which have been approved by the proper authority, shall be preferred claim against the funds accruing from the sale of the real property, livestock, equipment and farm produce of said demonstration farm. The balance of the fund, or any portion thereof necessary, accruing from the sale of the real property, livestock, equipment and farm produce of any of said demonstration farms shall be used to reimburse any local governmental unit, county or municipality, in such an amount as said local governmental unit, or units, may have contributed, as shown by record, toward the purchase of land for the establishment of said demonstration farms or for use in purchasing, constructing or repairing buildings or equipment for said demonstration farms. Any moneys remaining after the payment of all amounts due to such local governmental units shall be paid into the treasury of the school board in administrative control of the school to which the farm was formerly attached, to be used by said board, together with any other funds to the credit of that farm, in constructing and repairing buildings, and for purchasing equipment for the school to which the farm was attached."

You will note that the purposes for which the funds received from the sale of the demonstration farms named may be spent are definitely set out as follows: (1) The cost of effecting the sale. (2) All outstanding obligations against the demonstration farms which have been approved by the proper authority. (3) To reimburse any local governmental unit, county or municipi-

pality, in such amount or amounts as may have been contributed, as shown by the record, toward the purchase of land or construction or repairing of buildings or equipment for said **demonstration farms**. (4) Construction and repairing buildings and for purchasing equipment for the school to which the farm was attached.

In my judgment, authority to expend the money received from the sale of the demonstration farm here considered exists only when the expenditure is made for one of the above named purposes. It must be noted, however, that no authority to expend these funds for any purpose can exist until the legal obligations set out in the first three classifications of claims enumerated above have been paid. It must be further noted that the first two classifications are given preference over all other claims, and those claims enumerated in the third classification are given preference over expenditure of any balance as enumerated under the fourth classification. If authority to expend any money for the purposes named by you exists, it must be by reason of a balance on hand after all preferred legal claims have been paid. This expenditure, however, must be for constructing or repairing buildings or for the purchase of equipment for the school to which the demonstration farm was attached.

Answering your questions in the order asked, I advise you that it is my opinion that your first question must be answered in the negative. The mandate of the law is clear that the balance of the funds realized from the sale of the said farm shall be used as aforementioned in constructing and repairing buildings, and for purchasing equipment for the school to which the farm was attached.

In my judgment, your second question must also be answered in the negative. From your statement of facts, and upon information from the State Department of Education, it appears that the school building in question was built before a sale of the farm was perfected. It further appears that the farm was not sold in contemplation of raising funds for the purpose of constructing or repairing a building on the school site, nor was it within the contemplation of the board of education to apply the funds from the sale of the farm on the construction of the present high school building. In my judgment, the act of the Legislature quoted, *supra*, has no retroactive operation and applies only to construction, repairing and purchasing equipment subsequent to the date of the enactment of the act as well as the date of the sale of the farm in question. It is a well-known rule of statutory construction that statutes must be considered prospective in operation unless the language is such as to show that they were intended to be retrospective in operation.

Barnes v. City of Mobile, 19 Ala. 707;

Ex Parte Buckley, 53 Ala. 42,

New England Mortgage Security Co. v. Board of Revenue, 1 So. 30, 81 Ala. 110;

Leahart v. Deedmeyer, 48 So. 371, 158 Ala. 295;

Duy v. Alabama Western Rwy. Co., 57 So. 724, 175 Ala. 162;

Annotated Cases 1914(c), 1119;

Board of Revenue of Jefferson County v. Hewitt, 206 Ala. 405, 90 So. 781;

Globe Indemnity Co. v. Martin, 214 Ala. 646, 108 So. 761.

A further rule of statutory construction in this respect seems to fore-close the case at hand by holding announced by our Supreme Court to wit: "Statutes, generally, are construed as having only prospective operation unless intent to give them retrospective effect is expressly declared or necessarily implied", and, that "Statutes will not be construed as retroactive unless made so expressly or by unmistakable implication." **Hawkins v. People's Finance and Thrift Co.**, 219 Ala. 558, 122 So. 650; **State Bank of Elberta v. Peterson**, 226 Ala. 13, 145 So. 154; **Hartley v. Hand**, 223 Ala. 201, 135 So. 316; **Ward v. State**, 224 Ala. 252, 139 So. 416.

I find no specific provision in the statute here under consideration which would imply that retrospective operation was intended. It is therefore my opinion that the funds realized from the sale of the farm may not be legally applied to the payment of the school warrants mentioned in your second inquiry.

In my judgment, your third question must also be answered in the negative. A careful examination of the act discloses that the purposes named in your third question are not found within the purview of the terms of the act itself. As heretofore pointed out, no authority exists for the expenditure of any moneys except as specifically authorized in the above named statute, and I find no authority in the said statute for the expenditure named by your third question. I call your attention to an opinion rendered on April 17, 1940, to Hon. W. W. Malone, President of the City Board of Education of Athens, Alabama, which is authority for the conclusions herein reached.

The premises considered, it is my opinion that all of your questions must be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1940.

Hon. L. D. Dix, President,
Jury Commission,
Mobile County,
Mobile, Alabama.

Jury Commission—Discretion in Preparing Jury List.

The Jury Commission has no authority to eliminate from the jury list any person who is fully qualified and who is not exempt by law.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 11, 1940, in which you request my official opinion as follows:

"The Mobile County Jury Commission would thank you to advise in reference to Sections 14 and 17 of the Act approved March 2, 1939, "to establish a Jury Commission, etc." as to the following matter.

"Has the Commission any discretion in eliminating from the jury roll or jury box, or failing to include in the Jury roll and in the Jury box, the names of any male citizens who are not exempt by law and whom the Jury Commission considers fully qualified—

"A. If the Commission is advised that said citizen cannot serve without undue hardship?

"B. If said citizen is engaged in an important business or industry where the Commission is advised that he cannot readily be spared?

"C. Where citizen is a minister of the Gospel, and the Commission is reasonably sure that if summoned, he will ask to be excused, and that his request will probably be granted?

"In general, has the Commission any discretion in leaving out names of citizens it deems fully qualified, and who are not otherwise exempt?

"To what penalty would the members of the Commission be subjected for failure to carry out the duties prescribed by the Act?"

It is my opinion that under the facts presented in your request the jury commission has no authority to eliminate from the jury list any person who is fully qualified and who is not exempt by law.

The pertinent parts of the present law governing jury commissions (Act No. 59, S. 55, approved March 2, 1939, General Acts 1939, page 86), are set out below. From the following excerpts we may determine the method and amount of discretion exercised by the commission in preparing the jury rolls.

"Section 11. The clerk of the Jury Commission shall, under the direction of the Jury Commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Commission."

"Section 13. The Jury Commission * * * * shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged

alphabetically and by precincts in their numerical order and the Jury Commission shall cause to be written on the roll opposite every name place (sic.) thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the Jury Commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one cards (sic.)."

"Section 14. The Jury Commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or house holder his name may be placed on the jury roll and in the jury box."

"Section 17. The Jury Commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this Act to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. * * *"

From a careful study of the entire Act, and especially of the parts quoted above, it is my opinion that after the clerk of the jury commission prepares the list of all male citizens of the county over twenty-one and under sixty-five years of age, it is the duty of the jury commission to strike from the list the names of all persons who are by law exempt from jury duty and the names of those persons who are not qualified under Section 14, supra. The remaining names are then to be entered on the jury roll and cards made for each person and placed in the jury box.

Section 14, supra, provides the only criterion for the selection of names for the jury roll and jury box. The jury commission has wide discretion in striking names from the list prepared by the clerk, but this discretion is limited by the wording of this Section (*Green v. State*, 73 Ala. 26; *State v. Curtis*, 210 Ala. 1, 97 So. 291). The grounds for excluding names from the jury roll and jury box as set out in Section 14, supra, do not include any of the reasons specified in your request, viz., undue hardship, essential employment, or religious affiliations.

Section 17, supra, very clearly states that the jury roll and jury box must contain the names of all persons possessing the qualifications mentioned in Section 14, supra, and who are not exempt by law. Therefore, the only grounds for striking a name from the jury roll are found in Section 14, supra, and they do not embrace any of the reasons contained in your request.

Your second inquiry is answered by Section 10 of the Act in question, which makes it a misdemeanor for any member of the commission or the

clerk thereof to neglect to perform any duties imposed by the said Act. In addition to this provision, mandamus will lie to compel the proper performance of any duties prescribed by this Act (Williams v. Board of Dental Examiners, 222 Ala. 411, 133 So. 11).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1940.

Hon. Ed B. James, Superintendent
Department of Education,
Perry County,
Marion, Alabama.

Schools—County Superintendents of Education—Perry County—
Local Acts, 1931, page 146, construed—

1. County Superintendent of Education of Perry County held entitled to travel expense when authorized by the County Board of Education as part of compensatory contract of employment.

2. County Superintendent of Education held required to devote entire time to public school business, and without authority to accept part-time teaching work in a private school.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion dated September 6, 1940, follows:

"I wish to request that your office give me an opinion in the following case:

"I am an elected County Superintendent of Education of Perry County, Alabama.

"I wish an opinion as to whether I am entitled to expenses when I am on official business in or out of the County, and when in attendance at educational meetings, as the National Education Conventions, Alabama Educational Association meetings, and other similar meetings.

"Also an opinion in the following case:

"Being an elected Superintendent, can I legally accept work on a part time basis (for one or two periods of teaching each day) in a private

school, and accept pay for same? School is in no way connected with the State, nor supported with State funds."

I am of the opinion that your first inquiry should be answered in the affirmative, subject to the conditions set out below.

Section 6 of Act No. 301, S. 387, approved June 26, 1931 (Local Acts, 1931, page 146), provides as follows:

"Section 6. The salary of said office shall be fixed by the County Board of Education, but shall not be less than two thousand dollars per annum."

I call your particular attention to the provision governing the salary of the County Superintendent of Education of Perry County in which you will note that no maximum salary or compensation is provided for by the above quoted provision of the local law. This being true, the inquiry presented does not come within the influence of the case of *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235, as modified by Act No. 160 S. 126, approved March 2, 1937 (General Acts, 1936-37, page 181).

An opinion of this office rendered to the State Comptroller on August 1, 1935 (Biennial Report of Attorney General, 1934-36, page 263) held that county boards of education have authority under the general law to fix in their discretion the contract of employment of a county superintendent of education, which contract of employment may include expense allowances. In said opinion it was stated:

"The necessity of fixing a definite contract of employment is apparent as an incident to the power and authority expressly granted. In the absence of any statutory provisions governing the fixing of a contract of employment, it is my opinion that the Legislature intended that the county board should have the right to fix such compensation for the county superintendent as in their discretion would be fit and proper. In my judgment, the county board has authority to fix the salary, and, if, in their judgment, an expense account is necessary, it is my opinion that the county board may provide such an expense account as the board deems proper. * * *"

Since there is no maximum compensation restriction regarding the County Superintendent of Education of Perry County, the rule set out in the opinion in the Biennial Report above referred to, in my judgment, is applicable to the instant inquiry subject to the minimum salary limitation.

The premises considered, it is my opinion that you, as Superintendent of Education of Perry County, are entitled to expenses when on official business in or out of the county, and when in attendance at educational meetings, when such expenses are authorized by an expense account as part of the contract of employment, subject to the limitations set out below.

It is my opinion, however, that unless the expense accounts named are made a part of the contract of employment at the beginning of the term of office of the superintendent of education, no authority of law exists for allowing it later. Cf. Opinion to Hon. E. B. James, Perry County, under date

of September 23, 1937, Quarterly Report of Attorney General, Vol. VIII, page 304; and Opinion to Hon. J. E. Keller, Superintendent of Education, Montgomery, Alabama, under date of March 1, 1937, Quarterly Report of Attorney General, Vol. VI, page 98.

In reply to your second question, I wish to advise that, in my opinion, you, as County Superintendent of Education cannot accept work on a part-time basis in a private school.

I wish to refer you to Section 149 of the School Code of 1927, which provides as follows:

"149. County Superintendent Must Devote Entire Time to Office.—The County Superintendent of Education shall devote his entire time to public school business, and shall receive such compensation as the County Board of Education shall direct. In counties where superintendents of education are elected by direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office."

You will note that Section 149 of the School Code provides that the county superintendent of education shall devote his entire time to public school business.

I wish to further refer you to an opinion of the Attorney General addressed to Hon. A. H. Collins, State Superintendent of Education, under date of October 26, 1939, Quarterly Report of Attorney General, Vol. XVII, page 142, a copy of which opinion I enclose for your convenience.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 28, 1940.

Hon. Joe Patton,
Tax Collector,
Sumter County,
Livingston, Alabama.

Elections—Qualification of Voters—County Liners—Residence—

1. A person whose home or house or dwelling is approximately one-quarter of a mile from the county line is not a county liner within the purview of Sections 367 and 368 of the Code of Alabama, 1923, even though the plantation on which his home or house or dwelling is located is equally divided by the county line between two counties.

2. Such a person is a resident of the county in which his home or house or dwelling is situated, and is not entitled to select the county of his residence in the manner provided in said sections.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion dated September 7, 1940, follows:

"Mr. A. B. Stutts lives and operates a plantation that is equally divided in Sumter & Choctaw Counties, the majority of the 'open' land is situated in Sumter County where he spends the larger part of his time, consequently his main interest is in Sumter County where most all of his business is transacted, and his political interest is also in Sumter County and he would like to register as a qualified voter here. The residence is approximately one quarter of a mile from the Sumter County line IN Choctaw County. Please advise me if he can qualify under Section 367 of the Code of Alabama of 1923. For your further information will state that Mr. Stutts is a voter of Etowah County and wants to make this transfer."

I assume that by your statement that the "residence" of the gentleman to whom you refer in your letter of inquiry is approximately one-quarter of a mile from the Sumter County line in Choctaw County, you mean that his home or house or dwelling is approximately one-quarter of a mile from the Sumter County line in Choctaw County. If this assumption is correct, it is my opinion that he is not a county liner within the purview of Sections 367 and 368 of the Code of Alabama, 1923, but rather that he is a resident of Choctaw County and does not have the right to select the county of his residence in the manner provided by said sections.

Sections 367 and 368 of the Code of Alabama, 1923, read, respectively, as follows:

"367. Residence in two or more counties; right to select.—When the place of residence of any person is located partly in two or more counties or precincts, such persons may select the county or precinct of their residence, and to that end may file a statement in writing in the office of the judge of probate of the county selected, setting forth the locality of their residence and the lines passing through the same, together with the county or precinct selected for residence, which statement, when filed and recorded, shall establish the residence of the person filing it in the county or precinct of their selection."

"368. Liners between counties or precincts.—Any person who may be declared to be a liner between counties or precincts, and shall have fixed his or her citizenship according to law and that may be hereafter provided in such cases, shall be construed a citizen and elector of the county or precinct in which he or she so fixes his or her citizenship, for all the purposes of this chapter."

The controlling factor in the instant case is what is meant by "place of residence" as that term is used in Section 367, *supra*. The only decision of the Appellate Courts of the State of Alabama construing either of these sections is the case of *Danforth v. Nabors*, 120 Ala. 430, 24 So. 891, but that case did not deal with the question of what is meant by "place of residence" as that term is used in Section 367, *supra*. Nor have I been able to find any opinions of this office dealing with that question.

While there are many definitions of the terms "place of residence" and "residence", depending upon the particular sense in which the terms are used, research has not disclosed a definition of either of these terms when used in the particular sense or manner that the term "place of residence" is used in Section 367, supra.

Without deciding whether or not the term "place of residence" as used in said section means the home or house or dwelling in which a person lives or means the curtilage of the home or house or dwelling, it is my opinion that it certainly does not mean a large plantation which might be equally divided by the line between two counties, but on which the home or house or dwelling in which the person lives is located approximately one-quarter of a mile from the line. Consequently, it is my opinion that the person described in your letter of inquiry is not a county liner within the purview of Sections 367 and 368, supra, even though the plantation on which his home or house or dwelling is located is equally divided by the county line between Choctaw and Sumter Counties, but rather that he is a resident of Choctaw County, and does not have the right to select the county of his residence in the manner provided in said sections.

Such, in my judgment, is in accordance with the intention of the Legislature in enacting said sections, and the intention of the Legislature in enacting a statute, when ascertained, is the law itself. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 30, 1940.

Mrs. W. Lee Stanley,
Clerk, Circuit Court,
Colbert County,
Tuscumbia, Alabama.

Costs—How paid in Probation Cases—

Where a defendant is placed on probation by order of the court and is required to pay the costs of the case, such probationer should pay all of the costs of the case and not just the portion which the State has paid under Section 3667, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

I have your letter of September 20, 1940, in which you request my official opinion as follows:

"Will you kindly render me an opinion on the following:

"Where a defendant has plead guilty and sentenced to the Penitentiary or Hard Labor and sentence suspended and defendant placed on probation, and taxed with the costs, should the defendant be liable for all the costs, or should he be liable for that part of the cost which the State pays only?

"I have some cases pending and would appreciate your opinion as early as possible."

In answer to the above request, it is my opinion that where a defendant is placed on probation and is required to pay the costs of the case, he should pay all of the costs taxed and not just that portion which the State pays under Section 3667, Code of Alabama, 1923.

When the order of the court is that the defendant pay the costs of the prosecution, this simply means all of the costs. Of course, the court could, if it should see fit, limit the payment of costs to any specific amount or to certain items of cost, but, when the order is to pay the costs, this would include all of the costs. I call your attention to Sub-section (g) of Section 4 of an Act known as "The Probation Act", (Act No. 278, S. No. 198, approved August 24, 1939, General Acts, 1939, p. 434), the pertinent part of which is as follows:

"* * * pay the fine imposed, all costs, or such portion thereof as the court may determine. * * *"

Quarterly Report of Attorney General, Vol. XVII, p. 40.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 30, 1940.

Hon. William E. Persons, Director,
Department of Corrections & Institutions,
CAPITOL.

Courts of County Commissioners—Boards of Revenue—Sheriffs—

1. Courts of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties vested with sole and exclusive power in the matter of determining the necessity for a new jail and having the same erected.

2. Courts of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties are charged with the duty of and have authority to repair existing jails.

3. Courts of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties have only supervisory duties over feeding of prisoners confined in county jail.

4. Sheriff charged with the actual duty of feeding prisoners, and the maintaining of proper sanitary conditions for prisoners in the county jail.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of August 28, 1940 follows:

"An opinion is requested by the Department of Corrections and Institutions on the following subject.

"Does a Court of County Commissioners or Board of Revenue of a county have the authority to require the building of a new jail, the repair of an existing jail or the enforcement of dietary and sanitary measures in an existing jail?

"Are the foregoing functions mandatory in the case of the Court of County Commissioners or County Board of Revenue or are these functions and duties invested in some other agency?"

The first inquiry propounded by you presents three questions; namely, (a) Does the Court of County Commissioners or Board of Revenue of a county have the authority to require the building of a new jail? (b) Does it have the authority to repair an existing jail? and (c) What power does it have over the enforcement of dietary and sanitary measures in an existing jail?

In my opinion, question (a) hereinabove set out should be answered in the affirmative. Section 212 of the Code of Alabama, 1923 provides as follows:

"212. The Courts of county commissioners and boards of revenue of the respective counties shall erect courthouses, jails and hospitals, and other necessary county buildings; and such courts and boards have authority to levy a special tax for that purpose. In counties in which a circuit court or court of like jurisdiction has been or is hereafter authorized to be held in more than one place, the court of county commissioners or board of revenue may build courthouses in each place of holding court, and in all counties wherein a circuit court or court of like jurisdiction is authorized to be held or may hereafter be authorized to be held in more than one place for six months or more during any year the court of county commissioners or board of revenue of such counties shall erect a courthouse and jail at each of such places where such court is held, such courthouses and jails to be adequate and commodious for the business of such court and county at such place, but this section shall not affect in any wise any local law heretofore enacted that is not in conflict herewith."

Our Supreme Court in the case of **Weeks vs. Bynum et al.**, 158 Ala. 231, 48 So. 489, in construing section 133 of the Code of Alabama, 1907, which section as amended now appears as Section 212, supra, made the following statement:

"Section 133 of the Code makes it the duty of the court of county commissioners to erect courthouses and other county buildings. This court is committed to the doctrine that in all cases, in the discharge of these statutory duties, the court of county commissioners exercises a discretion which cannot be controlled by any judicial tribunal, in the absence of fraud, corruption, or unfair dealing. Am. & Eng. Ency. Law, 996; **Hays v. Ahlrichs**, 115 Ala. 239, 22 South, 15; **White v. Hewlett**, 143 Ala. 374, 42 South 78; **Matkin v. Marengo Co.**, 137 Ala. 155, 34 South, 171. In the case last cited the court uses this language: 'Under our statutes there can be no doubt of the proposition that the court of county commissioners has sole and exclusive power and authority in the matter of determining the necessity for a new court house for the county and having the same erected, and in these matters they act, at least, in a quasi legislative capacity, and that their acts, when free from fraud, corruption, and unfair dealing, cannot be controlled by any other court.'"

While it is true that in the case of **Weeks vs. Bynum et al.**, supra, the principal question involved was the authority of the court of county commissioners to erect a court house; yet, it will be noted that the court did not limit its opinion in this regard solely to court houses but had it also embrace "other county buildings." Therefore, inasmuch as county jails were specifically mentioned along with county court houses in the said Section of the 1907 Code, which was being construed, it is my opinion that if the principal question involved in said case had been the authority of the court of county commissioners to erect a county jail, the Supreme Court would have reached the same conclusion. Attention therefore is called at this point to the fact that although Section 133 of the Code of Alabama, 1907 was amended (Gen. Acts 1915, page 544) and now appears in the 1923 Code as Section 212, supra, the powers and authority of the courts of county commissioners and boards of revenue of the respective counties in regard to the erection of court houses, jails, hospitals and other necessary county buildings, remain substantially the same. This being true, it is my opinion that the courts of county commissioners or boards of revenue or other like governing bodies of the respective counties of the State are charged with the duty of erecting county jails and in the said boards is vested the sole and exclusive power and authority in the matter of determining the necessity for the same.

It is my opinion that question (b) hereinabove set out should be answered in the affirmative. In this connection, attention is called to Section 210 of the Code of Alabama, 1923, which is as follows:

"210. The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the court of county commissioners, which court is authorized to make all necessary contracts for that purpose."

In view of the above quoted section, it is my opinion that the courts of county commissioners, boards of revenue or other like governing bodies of the respective counties are charged with the duty and have authority to repair existing jails. Biennial Report, Attorney General, 1926-28, page 716; **Weeks v. Bynum et al.**, supra.

In answer to question (c) hereinabove set out, I call attention to Section 4825 of the Code of Alabama, 1923, reading as follows:

"4825. The court of county commissioners, or boards of revenue, as the case may be, shall supervise the feeding of all prisoners in the county jails over which they have jurisdiction."

It will be noted that the above quoted section places only supervisory duties on courts of county commissioners, boards of revenues or other like governing bodies of the respective counties with reference to the feeding of prisoners confined in the county jails. However, the actual duty of feeding prisoners and the maintenance of proper sanitary conditions for them while confined in county jails devolves on the sheriff of the respective counties. This will be seen from a reading of sections 4826, 221, 4801 and 4822 of the Code of Alabama, 1923, which are respectively as follows:

"4826. The sheriff of the county, except as otherwise provided by existing laws, in person or by his deputy or jailer, shall feed the prisoners in the jail under his jurisdiction in accordance with the terms of this article."

"221. The appropriation having been made, and the sheriff having received payment thereof, it is his duty, so far as such appropriation will enable him, to keep the jail supplied with wholesome water for drinking and bathing, to keep drinking water accessible at all times to each prisoner, to keep it comfortably warm in cold weather, at all times clean and free from offensive odors, and provide with necessary water-closets, or dry earth, beds, bedding, and clothing for the use of prisoners."

"4801. The sheriff has the legal custody and charge of the jail in his county, and all prisoners committed thereto (except in cases otherwise provided by law), and may appoint a jailer for whose acts he is civilly responsible."

"4822. Whoever, being a sheriff, jailer, or other person having the care and custody of any jail, workhouse, prison or other lawful place of confinement, suffers the same to become foul or unclean shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars."

It follows, therefore, after a consideration of the foregoing provisions of law, that the courts of county commissioners, boards of revenue or other like governing bodies of the respective counties should see that the duties imposed upon the sheriff in connection with the feeding, etc., of prisoners confined in county jails are properly carried out. Upon the failure of the sheriff to properly carry out such duties, it would devolve upon the county governing body to report the same to the proper authorities.

In my opinion, my answer to your first inquiry pretermits the necessity of answering your second inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 30, 1940.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Alcoholic Beverage Control Act—Wine shipped into State.

Wine imported into this State from any other place for personal consumption of resident of this State is subject to such regulations, including imposition of State mark-up on wholesale costs, as Alabama Alcoholic Beverage Control Board may see fit to impose.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of September 19, 1940, is as follows:

"A resident of Etowah county, which is classified as wet, was recently given twelve (12) quarts of California wine by his brother in California. His brother procured the wine direct from a winery there, paid for it, and upon advice of his brother here, and the wine shipped (in accordance with the suggestion of a representative of the A.B.C. Board) to the A.B.C. Board in Montgomery for delivery to his brother in this county. The wine was not shipped for resale, but for personal consumption.

"The A.B.C. Board had it forwarded to its store in Gadsden for delivery to the consignee. When the consignee called for the wine the A.B.C. Board store manager refused to deliver it to him unless he paid \$6.48, claimed by the A.B.C. Board as the state mark-up on the wholesale cost delivered in Montgomery, which was a little over \$12.00.

"The A.B.C. Board claims the authority to tax the above interstate shipment under the authority of the A.B.C. Act, section 6(b), which reads as follows:

"Section 6. The functions, duties and powers of the Board shall be as follows:

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein."

"They cite an opinion of the Attorney General under date of May 29th, 1937 addressed to Honorable Frank O. Deese.

"Please advise me whether in your opinion the provision of the A.B.C. Act quoted confers the authority on the A.B.C. Board to demand and collect from a donee residing in a wet county the state mark-up on a shipment legally purchased in another state and shipped in interstate

commerce to a resident of this county; and if you hold that the Board does have such authority advise whether the quoted Act is not, to the extent that it confers such authority, unconstitutional as a 'regulation of interstate commerce.'"

Replying to your request, you are advised that the Alabama Alcoholic Beverage Control Board is vested with the full and complete authority to impose the condition detailed in your letter of inquiry. This office has heretofore ruled in an opinion rendered to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, under date of May 29, 1937 (Quarterly Report Attorney-General, Volume VII, page 172), that alcoholic beverages purchased legally in another State cannot be legally possessed in the State of Alabama without authority of the Alabama Alcoholic Beverage Control Board of this State.

Section 6 (b) of the Alabama Alcoholic Beverage Control Act, Act No. 66, H. B. 44, passed by the House and Senate February 2, 1937, notwithstanding veto, under Section 125 of the Constitution (General Acts 1936-37, page 40) quoted in your letter of inquiry, grants full and complete authority to the Alabama Alcoholic Beverage Control Board to control the possession and delivery of the alcoholic beverages defined in the Act.

Numerous other sections of the Alabama Beverage Control Act are indicative of the control vested in the Alabama Alcoholic Beverage Control Board by the Legislature over matters of this kind. Instance, the provisions contained in Section 6 (g) that "price of all spiritous and vinous liquors **dispensed** by the Board shall be fixed by the Board * * *", and in Section 6(i) that the Board has authority "to fix the wholesale and retail prices at which liquors shall be sold at Alabama Liquor Stores."

See also Section 7(a), in which it is provided that the Board may, from time to time, make such regulations, not inconsistent with the Act, as it shall deem necessary for carrying out the provisions of the Act, and, from time to time, alter, repeal or amend such regulations or any of them. Attention is also called to Subsection 4 of Section 8(c), requiring that "all sales made by and **through** State Liquor Stores shall be for cash only", and to Subsection 3 of Section 19, which provides that all vinous beverages, whether or not manufactured within or without this State, can be sold by the manufacturers only to State Liquor Stores, as defined by the Act.

Subsection 9 of Section 24 makes it unlawful for any person to transport or import any vinous beverages into this State except in accordance with the rules and regulations of the Board. And, by Section 26, the Alabama Alcoholic Beverage Control Board is again authorized, empowered and directed to supervise the conduct, management and operation of the sale and **distribution** within this State of all vinous beverages of an alcoholic content of not to exceed twenty-four percent by volume. And, in Section 51, there is found the provision prohibiting importation into this State from any other place of alcoholic beverages of any kind without authority of the Alabama Alcoholic Beverage Control Board of this State. This provision of Section 51 is made the basis of the opinion to Judge of Probate Deese, supra.

It will be readily seen, therefore, from the foregoing provisions of the statute that, while the Act is very clear in its pronouncement prohibiting the sale of vinous beverages in this State by other than the State Liquor Stores

or licensees under the Act, a field is permitted for the handling of situations such as has arisen under the facts detailed in your letter of inquiry. In such a situation it is clear that the Legislature contemplated that if the Alabama Alcoholic Beverage Control Board desired to permit the importation into this State of vinous beverages by residents of this State it might do so, subject to such conditions as it might see fit to impose on such importation. It is my information that it has been the custom of the Board since its inception, from which it has never varied, to charge to the party receiving such imported vinous beverages or other alcoholic beverages the State "mark-up". This "mark-up" is no more a tax than is the "mark-up" placed on vinous and other alcoholic beverages sold through the State liquor Stores. Rather it has been classed as "earnings" of the Board. See Section 55 of the Act describing the revenues received by the Board as "license taxes and earnings".

Any other conclusion would lead to a result never contemplated by the Legislature, i.e., that persons might ship beverages of all kinds and descriptions into the State in competition with the sales made by the State Liquor Stores, thus depriving such liquor stores of a portion of their revenues and depriving the beneficiaries of the Alabama Beverage Control Act of the funds naturally accruing to them under its provisions. It seems clear to me that if a party avails himself of the services of the Alabama Alcoholic Beverage Control Board which have been detailed in your letter of inquiry, i.e., having the Alabama Alcoholic Beverage Control Board receive wines shipped to him from out of the State, handle the same in their warehouse and transmit the same to their liquor stores for delivery to such party, that party has no just complaint if the Board charges him the same price he would have paid on such wines if purchased from such liquor stores, making due allowance for the wholesale price already paid.

With regard to your question concerning the constitutionality of the provision quoted and the ruling made thereunder, you are advised, first, that the Supreme Court of this State has, after an exhaustive consideration of the Act, held it to be constitutional in all respects. See *State ex rel. Wilkinson v. Murphy*, 237 Ala. 332, 186 So. 487. Moreover, since the adoption of the Twenty-first amendment to the Constitution of the United States it has been repeatedly held that the authority of a State to regulate the movement of liquor into the State is recognized by the amendment itself, and where availed of, as in this case, the importation of intoxicating liquors in violation of local law is outside the commerce clause. *General Sales and Liquor Company v. Becker*, 14 F. Supp. 348; 350; *Dugan v. Bridges*, 16 F. Supp. 694, appeal dismissed, 300 U. S. 684; *State Board of Equalization of California v. Young's Market Company*, 299 U. S. 59, rehearing denied, 299 U. S. 623.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 30, 1940.

Hon. G. M. Watson,
Superintendent of Education,
Marengo County,
Linden, Alabama.

Schools—County Library—Appropriations by School Board—

A County Board of Education is without authority to make an appropriation or contribution of school funds to a library of the county that has no connection with any public school or public school system of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 6, 1940, in which you request my official opinion as follows:

"As County Superintendent of Education I am authorized and directed by the Marengo County, Alabama, Board of Education to ask you for an opinion on the legality of an appropriation of school funds by the said County Board of Education for participation in the establishment of a county-wide Works Projects Administration library sponsored by the Marengo County Board of Revenue. The library is to be general in its purpose and use. It will not be housed in, nor connected with any public school or schools. It is not specifically a school library nor a public school project. It appears that the Federal Government through the Works Projects Administration fosters libraries for the general public and expects the local sponsoring agency to contribute toward the establishment of a county-wide library a minimum of One Thousand Dollars. To this the state adds a thousand dollars and the Federal Government adds a thousand dollars making a total minimum of three thousand dollars for the establishment of a county-wide library project. The County Board of Education is unable to speak of the permanency of the project, or as to how the capital outlay will be safeguarded or even as to how the project will be perpetuated.

"The question involved is that of legal authority only. Will you, therefore, at your earliest convenience give to the Marengo County Board of Education an opinion as to its authority to make an appropriation from any public school fund derived from tax levies or state appropriations for such purpose."

I gather from your request that you simply desire to know if an appropriation can be made by the Board of Education of your county from the school funds to a public library which is not in any way connected with the public school system of your county.

It is my opinion that your question must be answered in the negative for the reason that the library is to be general in its purpose. It will not be housed in or connected with any public school or schools; it is not specifically

a school library nor a public school project. I realize that the county may establish and maintain a free public library for the use of the citizens of a county, either separate or in connection with the public schools—*Gray v. State*, 231 Ala. 229, 164 So. 239. However, if the library you desire to establish in Marengo County is not, as you state, connected in any way with the public schools of your county, the county board of education is not authorized to make any appropriation of school funds for its establishment or maintenance. In this connection I call your attention to Section 391 of the School Code of Alabama, 1927, which is as follows:

“391. County may appropriate funds for school libraries.—The Commissioners' Court, Board of Revenue or Board of Education in any County is hereby authorized to appropriate not less than ten dollars to any public school under the control of the County Board of Education and to any County High School for the purpose of establishing, maintaining, enlarging or improving public libraries in such schools.

It can be seen from Section 391, *supra*, that in order for the Board of Education to contribute to such library, it must be established in whole or in part in connection with the public schools of the county. In an opinion of this office, rendered to Hon. Oliver E. Young, Senator, 12th Senatorial District, Vernon, Alabama, on March 30, 1939, (Quarterly Report of Attorney General, Vol. XIV, p. 286) it was held that the Board of Education may make an appropriation to a county public library where such library is established in connection with the public schools of the county, but that opinion is no authority for your board of education to make the appropriation in question as the particular library you have in mind is wholly divorced from any public school or public school system of your county. Therefore, it is my opinion that your County Board of Education is without authority to make a contribution or appropriation to the library above described.

In my opinion the 1939 Library legislation enacted at the 1939 session of the legislature has no bearing on the questions here considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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